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## ARTICLES

# "COMING TO OUR SENSES": COMMUNICATION AND LEGAL EXPRESSION IN PERFORMANCE CULTURES

*Bernard J. Hibbitts**

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* Associate Professor, University of Pittsburgh School of Law. Special thanks must go to Charles Donahue, Harry Flechtner, and several anonymous tenure evaluators for reviewing either drafts of this Article or the manuscript from which it is drawn. I am also greatly indebted to David Pontzer and Brian Malkin, two extraordinary research assistants who made my work both possible and pleasurable. A third research assistant, Scott Etter, did yeoman service as a proofreader in the Article's final stages. Responsibility for any errors or misinterpretations contained herein is, of course, mine alone.

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## I. INTRODUCTION

> They have . . . eyes, but do not see.
> They have ears, but do not hear; noses, but do not smell.
> They have hands, but do not feel.
>
> *Psalms* 115:5-7[1]

Although the days of its dominion in our culture are numbered, the written word still shapes our lives. Because it is immutable, the written word preserves the details of our thoughts and experiences against the shortcomings of our memories. If ever we should forget what we once thought or did, it can remind us of those things as completely and exactly as we originally recorded them. Because it is portable, the written word allows us to communicate over great distances with people we cannot speak to or see. As a result, our search for knowledge is bounded neither by the limited range of our personal mobility, nor by the parochialism of our local friends and acquaintances. Because it is both duplicable and durable, the written word permits us to contact many more people than we can meet in our own lifespans. Reproduced in potentially countless copies, it can reach a multitude of our contemporaries; thus distributed, it stands a good chance of surviving (in at least one copy) long enough to influence later generations. At the same time, it can bring us the ideas of a whole host of present and past personalities.

The written word has been so powerful in our society that it has conditioned our very vocabulary. Twentieth century American English is full of

[1] Revised Standard Version.



idioms that in some way refer either to writing or to its modern mechanical analogue, print. When an event is inevitable, we say that "the writing is on the wall." When we become convinced that someone is going to lose a contest or a race, we "write them off." When something is obvious, we say it is "black and white," the colors of the printed page. When we want someone to appreciate the deeper meaning of an event, we ask that they "read between the lines." In academic journals, many scholars interpret the world and its many social and intellectual phenomena as so many "texts." Writing- and print-based expressions have become especially popular in the paper-choked prescincts of the law. Law students frequently say that real law is "black letter." A policeman who charges a suspect with every conceiveable offence "throws the book" at him. A careful judge is supposed to follow "the letter of the law."

Such a consummate embrace of the written word has not been without its costs. In the twelfth and thirteenth centuries, the immediate European progenitors of our culture turned increasingly to writing to help preserve information and customary lore that had been primarily perpetuated and celebrated in sound, gesture, touch, smell, and taste.[2] Once this corpus was inscribed, and thus removed from its original multisensory context, it slowly but indubitably became the creature of the medium that claimed to sustain it. Writing encouraged subtle alterations in the style and sometimes even the substance of age-old traditions and tales. From the sixteenth century, as the printing press stimulated the universalization of literacy, writing's social and intellectual grip on Western societies became so strong that more traditional channels of communication lost a crucial measure of their surviving legitimacy.[3] Literate groups no longer satisfied with

[2] For discussions of writing's growing use and impact during this period, see MICHAEL T. CLANCHY, FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307 (1979) [hereinafter MEMORY]; BRIAN STOCK, THE IMPLICATIONS OF LITERACY: WRITTEN LANGUAGE AND MODELS OF INTERPRETATION IN THE ELEVENTH AND TWELFTH CENTURIES (1983); JAMES W. THOMPSON, THE LITERACY OF THE LAITY IN THE MIDDLE AGES (1963). Recent scholarship has emphasized that some medieval European groups used writing for important public and private purposes prior to the twelfth century. *See, e.g.*, ROSAMOND MCKITTERICK, THE CAROLINGIANS AND THE WRITTEN WORD (1989); THE USES OF LITERACY IN EARLY MEDIEVAL EUROPE (Rosamond McKitterick ed., 1990). The twelfth and thirteenth centuries nonetheless constitute a watershed during which the general incidence and influence of writing increased dramatically.

[3] The classic introductions to the subject of print's impact are ELIZABETH L. EISENSTEIN, THE PRINTING PRESS AS AN AGENT OF CHANGE: COMMUNICATIONS AND CULTURAL TRANSFORMATIONS IN EARLY MODERN EUROPE (1979); MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN (1962).

merely sharing the cultural stage began competing for outright social and intellectual hegemony against the institutions and classes that continued to employ and embrace older expressive forms. In the process, spoken rhetoric was denigrated.[4] Gestures were demeaned.[5] Theater was suppressed.[6] Paintings were whitewashed and sculptures were smashed.[7] Smells and tastes were striken from the accepted vocabulary of literary expression.[8] The initially harsh, even violent literate campaign against these media eventually gave way to a grudging tolerance, and in some European countries (such as baroque France and Italy) traditional media even experienced a limited revival, but considerable damage to their original social and intellectual status had already been done.[9]

The cultural decline of speech, gesture, image, touch, smell, and taste in the face of writing's triumph is hardly surprising. After all, readers and writers have no need of such devices to understand or to be understood. Readers do not derive information from the pages of books by listening to them or feeling them or smelling them (modern-day "scratch and sniff" aside);[10] writers do not communicate their messages by the direct manipulation of sound, gestures, images, or scents. Today we certainly have not abandoned these forms of expression—we still speak, sing, gesture, dance,

[4] *See, e.g.*, BARBARA J. SHAPIRO, PROBABILITY AND CERTAINTY IN SEVENTEENTH CENTURY ENGLAND 227-66 (1983); Hugh M. Davidson, *The Decline of Rhetoric in Seventeenth Century France*, *in* 1 THE HISTORY AND PHILOSOPHY OF RHETORIC AND POLITICAL DISCOURSE (Kenneth W. Thompson ed., 1987).

[5] One sixteenth century Protestant commentator thus wrote: "Some foolishly imagine that praier [sic] is made either better or worse by the jesture [sic] of our bodyes [sic]." Keith Thomas, *Introduction* to A CULTURAL HISTORY OF GESTURE 6 (Jan Bremmer & Herman Roodenberg eds., 1992).

[6] *See, e.g.*, Michael O'Connell, *The Idolatrous Eye: Iconoclasm, Anti-Theatricalism and the Image of the Elizabethan Theater*, 52 ENG. LITERARY HIST. 279 (1985).

[7] *See, e.g.*, JOHN PHILLIPS, THE REFORMATION OF IMAGES: DESTRUCTION OF ART IN ENGLAND 1535-1660 (1973).

[8] *See* LUCIEN FEBVRE, THE PROBLEM OF UNBELIEF IN THE SIXTEENTH CENTURY: THE RELIGION OF RABELAIS 423-32 (Beatrice Gottlieb trans., 1982); ROBERT MANDROU, INTRODUCTION TO MODERN FRANCE, 1500-1640: AN ESSAY IN HISTORICAL PSYCHOLOGY 56-57 (R.E. Hallmark trans., 1976).

[9] On the eventual rejection of traditional media within European baroque cultures, see, for instance, James van Horn Melton, *From Image to Word: Cultural Reform and the Rise of Literate Culture in Eighteenth Century Austria*, 58 J. MODERN HIST. 95 (1986).

[10] For true bibliophiles, these sensory experiences may nonetheless be the source of some pleasure. Thus, the comment of nineteenth century English essayist William Hazlitt: "Oh, delightful! . . . to cut open the leaves [of a book], to inhale the fragrancy of the scarcely dried paper." William Hazlitt, *On Reading New Books*, MONTHLY MAG., July 1827, *quoted in* HOLBROOK JACKSON, THE ANATOMY OF BIBLIOMANIA 608 (1981).



and so forth—but we have shifted them from their former position at the center of our cultural universe to a distinctly secondary, more restricted role. They are rarely welcome in our world of "serious" intellectual communication, and when they do appear there (for example, in liturgy or theater), they are strictly regulated by written scripts.[11]

In addition to influencing our behavior and our attitudes towards each other, our tendency to identify serious intellectual communication with writing has profoundly affected our attitude towards past and contemporary societies that have had little or no experience with the written word. Heedless of their actual learning, creativity, and depth, we have all too often imposed on these cultures our own conclusions about which forms of cultural expression are important. More concerned with what we perceive to be their weaknesses than with their strengths, we have condescendingly labeled their members "illiterate" or "inarticulate." In so doing, we have implied either that their lack of literate skills makes them inherently inferior, or that their tendency to set little or nothing down in writing amounts to them saying nothing at all.

As this century has progressed, more and more scholars have rejected these negative characterizations. It is no coincidence that they have done so while writing and thinking in the midst of a Western culture that, under the influence of new technologies and new media, has begun to rediscover and rehabilitate previously delegitimated forms of communication. In the decades after 1920, for example, a number of prominent scholars began to reconceive preliterate and marginally literate cultures positively as "oral," that is to say, based on spoken rather than written communication.[12] At the same time, their own culture was rapidly reacquainting itself with the sound of the human voice. The telephone and the phonograph, the two great "talking machines" of the late nineteenth century, were by this period ubiquitous, and the novel mass medium of radio

[11] To most people in our society, these scripts are more "real" than the religious services or performed plays based on them. This fact may help to explain why, for instance, we study Shakespeare on the page instead of on the stage.

[12] *See, e.g.*, MILMAN PARRY, L'EPITHETE TRADITIONNELLE DANS HOMERE (1928), *translated in* THE MAKING OF HOMERIC VERSE 1 (Adam Parry ed., 1971); H. MUNRO CHADWICK & N. KERSHAW CHADWICK, THE GROWTH OF LITERATURE (1932); HAROLD A. INNIS, EMPIRE AND COMMUNICATION (1950); HAROLD A. INNIS, THE BIAS OF COMMUNICATION (1951). For the most elaborate and detailed version of this proposition see WALTER J. ONG, ORALITY AND LITERACY: THE TECHNOLOGIZING OF THE WORD (1982).

was speaking to European and American householders for hours on end.[13] Sensitized to the place and power of oral communication in their own surroundings, scholars of this era predictably took a greater interest in its role and influence in other societies.[14]

Theirs was doubtless an important academic breakthrough, but it was not critical. After all, speech is merely the oral form of the written word. As two scholars have since noted:

> The idea that the Great Transformation was [therefore] from speaking to writing [was] a statement of how much we focus on words, how much we see words as the key form of expression, the key to mentality, and even the key to humanity itself. The spoken word may be different from the written word, but . . . [t]he gap between writing and speaking is but a small leap compared to the chasm between words and everything else.[15]

More recently, a further intellectual shift seems to have occurred. Younger scholars studying preliterate and marginally literate cultures (as well as, to some extent, our own society) have developed a greater appreciation for nonverbal expression, especially the visual forms of gesture, dance, and image.[16] It is no coincidence that these forms are the staples of

[13] On the modern "aural revolution," see Cynthia Ozick, *The Question of Our Speech: The Return to Aural Culture, in* METAPHOR AND MEMORY (1991); Frank A. Biocca, *The Pursuit of Sound: Radio, Perception and Utopia in the Early Twentieth Century*, 10 MEDIA, CULTURE & SOC'Y 61 (1988).

[14] For a rare acknowledgement of the intellectual impact of radio on scholars writing as late as the early 1960s, see ERIC A. HAVELOCK, THE MUSE LEARNS TO WRITE: REFLECTIONS ON ORALITY AND LITERACY FROM ANTIQUITY TO THE PRESENT 30 (1986) ("Why, in particular, this focus on the spoken language in contrast to the written? . . . We had all been listening to the radio, a voice of incessant utterance, orally communicating fact and intention and persuasion, borne on the airwaves to our ears.").

[15] James Carrier & Achsah Carrier, *Every Picture Tells a Story: Visual Alternatives to Oral Tradition in Ponam Society*, 5 ORAL TRADITION 354, 354 (1990).

[16] A good example of this heightened awareness is the recent admission of one expert in "oral history" that "for . . . peasants, the quintessential 'unheard' people, the visual dimension is absolutely crucial to their stories." Dan Sipe, *The Future of Oral History and Moving Images*, 19 ORAL HISTORY REV. 75, 84 (1991); *see also* FRANCOIS GARNIER, LE LANGAGE DE L'IMAGE AU MOYEN AGE (1982); JUDITH L. HANNA, TO DANCE IS HUMAN: A THEORY OF NON-VERBAL COMMUNICATION (1979); KARL F. MORRISON, HISTORY AS A VISUAL ART IN THE TWELFTH CENTURY RENAISSANCE (1990); A CULTURAL HISTORY OF GESTURE, *supra* note 5; Carrier & Carrier, *supra* note 15; Harold Scheub, *Body and Image in Oral Narrative Performance*, 8 NEW LITERARY HIST. 345 (1977). Prior to the late 1970s, scholars such as Marshall McLuhan and Walter Ong had written about nonverbal media and their impact on present and, to some extent, past societies, but neither had used his observations to formally rework the prevailing speech-oriented concept of "oral culture."



television, the new medium on which virtually all of these scholars were weaned. Unlike the telephone, the phonograph, or the radio, television has radically extended our perceptual sensitivities. Although it incorporates speech, it is significantly nonverbal. It deals in forms of expression that are not readily translated into, or from, writing. Television has had such an intellectually liberating impact that it has even encouraged some scholars to consider the anthropological and historical role of touch, smell, and taste—media that are not only nonverbal, but nonvisual.[17] In the wake of all these efforts, the term "oral culture" appears increasingly inadequate as a characterization of a preliterate or marginally literate society.[18]

The conceptual inadequacy of "oral culture" may have far-reaching intellectual consequences. In the last half-century, many media theorists have argued that due to society's dependence on communication for its very survival, media shape society in their own image.[19] Relying on a given medium (or a complex of media) for the propagation of significant information encourages communities to favor behavior and beliefs compatible with the character and use of that medium (or that complex). Applying this theory, proponents of orality claim to have found the essential qualities of sound and the spoken word reflected in the social practices and values of their "oral cultures," thereby making that concept sociologically as well as technologically significant.[20] If, however, their identification of the media base of these societies turns out to have been inappropriately limited, many of their sociological conclusions premised on that

[17] McLuhan recognized early on that "TV has opened the doors of . . . perception . . . to the non-visual world," MARSHALL MCLUHAN, UNDERSTANDING MEDIA 54 (1964), but most scholarly progress in this area is of much more recent vintage. *See, e.g.*, PAUL STOLLER, THE TASTE OF ETHNOGRAPHIC THINGS: THE SENSES IN ANTHROPOLOGY (1989); THE VARIETIES OF SENSORY EXPERIENCE: A SOURCEBOOK IN THE ANTHROPOLOGY OF THE SENSES (David Howes ed., 1991) [hereinafter VARIETIES].

[18] Anthropologist Ruth Finnegan has recently made a similar point in the rather more limited context of "oral poetry," the dominant literary genre of most oral cultures: "it is emerging more and more that when we speak of 'oral poetry' . . . we need to take account of more than just the *words* . . . . [T]he analysis of oral poetry now really has to be extended into the spheres of kinesics, visual expression, and communication media or symbols more generally." RUTH FINNEGAN, ORAL POETRY: ITS NATURE, SIGNIFICANCE AND SOCIAL CONTEXT xi-xii (1992) (italics in original).

[19] Thus, McLuhan's famous aphorism, "The medium is the message."

[20] *See* ERIC A. HAVELOCK, PREFACE TO PLATO (1963); WALTER J. ONG, THE PRESENCE OF THE WORD: SOME PROLEGOMENA FOR CULTURAL AND RELIGIOUS HISTORY (1967); ONG, *supra* note 12.

identification must be doubted. If not totally wrong, these conclusions are, at the very least, too ambitious.

As yet, the growth of academic interest in the use and cultural implications of different media has had relatively little impact on legal scholarship in general, and on Anglo-American legal writing in particular.[21] The disciplinary disinterest may be partly due to the fact that the legal profession has only begun to be seriously affected by new aural and visual technologies. Indeed, while society as a whole has started to lose interest in writing, lawyers have seemingly become more insistent upon it, and have taken to stuffing libraries, registrars' offices, and their own filing cabinets with written records at an unprecedented rate. Still actually and metaphorically bent over their writing desks, they have given little thought to the legal applications and implications of alternative media either in their own society or in others.

The specific indifference of Anglo-American legal academics may additionally be a by-product of cultural heritage. Having officially rejected the Catholic Church in favor of Protestantism, Anglo-American culture from the sixteenth century onwards pointedly suppressed the institution that most successfully employed and defended nonwritten media in a world otherwise dominated by writing. In this context, Anglo-American scholars have found it easy to be oblivious to those media. Of course, under the pressure of print, the cultural significance of speech, gesture, and other traditional forms of expression eventually declined even in Catholicism's Continental stronghold. The greater acceptance and prosperity that the Catholic faith enjoyed on the Continent nonetheless managed to keep those forms more in the public eye there, thus preserving them as fit subjects for scholarly scrutiny. Once modern technological changes revived their prominence and popularity, they were relatively more accessible to academic investigation.[22]

[21] Continental legal scholars have notably shown some interest in the subject since the early nineteenth century. *See, e.g.*, Jacob Grimm, *Von der Poesie im Recht [1815], in* 6 JACOB GRIMM, KLEINERE SCHRIFTEN 152-91 (1882); JACOB GRIMM, DEUTSCHE RECHTSALTERHÜMER (1828); JULES MICHELET, ORIGINES DU DROIT FRANCAIS CHERCHEES DANS LES SYMBOLES ET FORMULES DU DROIT UNIVERSEL (1837), *in* JULES MICHELET, 3 OEUVRES COMPLETES (1973); JOSEPH-PIERRE CHASSAN, ESSAI SUR LA SYMBOLIQUE DU DROIT PRIMITIF (1847). Unfortunately, very little of this pathbreaking work and the scholarship it has inspired has been translated into English.

[22] Note, for instance, the leadership of French scholars in chronicling and analyzing the history of gesture. GARNIER, *supra* note 16; JEAN-CLAUDE SCHMITT, LA RAISON DES GESTES DANS L'OCCIDENT MEDIEVAL (1990); Jacques Le Goff, *Gestures in Purgatory, in* THE MEDIEVAL IMAGINATION 86 (Arthur Goldhammer trans., 1988).



Lately there have been signs that our days of disregarding the relationship between law and modes of communication may be coming to an end. In 1979, Michael Clanchy published *From Memory to Written Record: England 1066-1307*,[23] a book that documented the gradual rise of writing as the dominant medium of English law and administration between the eleventh and fourteenth centuries. In *The Electronic Media and the Transformation of Law*, a much grander work published in 1989, M. Ethan Katsh attempted to chronicle and assess the historical impact of speech, script, print, and electronic media on the concept of legal precedent, styles of dispute resolution, the doctrine of copyright, the development of the legal profession, and the idea of individual rights in a variety of different contemporary and historical societies.[24]

For all their interesting and important insights, both books have significant limitations. Both Clanchy and Katsh apparently subscribe to the superceded argument that societies which have little or no experience with writing are fundamentally oral. They consequently conceive of most preliterate and marginally literate law as living in speech. Ironically, the younger of the two, Katsh, is more thorough-going in these respects. He dismisses nonverbal varieties of what he terms "preliterate" expression in four pages dealing with ritual and ceremony.[25] This intellectual move does him considerable damage, given his desire to relate the legal practices and values of different societies to the characteristics of their media.[26] As a result of confining his sensory focus, his conclusions concerning the nature and structure of law in preliterate and marginally literate cultures are at worst compromised, and at best cheapened. In describing the early forms of English legal and political communication that writing initially supple-

[23] *See supra* note 2.

[24] M. ETHAN KATSH, THE ELECTRONIC MEDIA AND THE TRANSFORMATION OF LAW (1989). For a recent article developing Katsh's analysis in the realm of audio-video technology, see Ronald K. Collins & David M. Skover, *Paratexts*, 44 STAN. L. REV. 509 (1992).

[25] KATSH, *supra* note 24, at 60-63.

[26] Relying heavily on Katsh (and, ultimately, Ong), Collins and Skover are guilty of the same oversight when they purport to describe the law of preliterate and marginally literate societies solely under the heading of "Law and the Spoken Word." Subsequently, however, they reveal the limitations of both their subtitle and their overarching cultural model by spending several paragraphs talking about the ritual and "visual drama" of law in oral societies. Collins & Skover, *supra* note 24, at 516-18.

mentcd and eventually displaced, Clanchy takes nonverbal media more seriously, but he nonetheless gives them minor billing. Neither author draws on the growing corpus of anthropological and historical literature analyzing the vital communicative roles of gesture, touch, smell, and taste in preliterate and marginally literate societies.[27]

Because neither Clanchy nor Katsh pays much attention to the role of nonverbal communication in preliterate and marginally literate culture and law, neither seriously considers how or why different media may be employed simultaneously to deliver complementary parts of the same message. Katsh in particular seems not to have recognized that in societies having little or no experience with writing, different expressive forms routinely appear and work together. Far from operating in splendid isolation, speech functions in a sensory environment where oral, visual, and other media constantly supplement, modify, reinforce, and sometimes even purposefully contradict one another.[28] Applied to preliterate and marginally literate law, this observation suggests that more attention should be paid to how, why, and with what effect the various aural, visual, and other sensory elements of a legal message combine to create an overall impression.

In this Article, I offer the concept of "performance culture" as a vehicle for remedying these rather basic deficiencies in the legal literature. At one level, "performance culture" is just another name for "oral culture." Both terms refer to societies having either no experience with writing, or so little experience with that medium that their preliterate expressive and intellectual habits persist essentially unchanged. Among these societies I count pre-Hellenistic Greece (to the middle of the fourth century B.C.),[29] biblical Israel, early and middle republican Rome (to the first century

[27] *See supra* notes 16-17.

[28] This point was not entirely lost on such pioneering media theorists as Innis and McLuhan. In 1951, Innis observed, "In oral intercourse the eye, ear, and brain, the senses and the faculties acted together in busy co-operation and rivalry each eliciting, stimulating and supplementing the other." INNIS, *supra* note 12, at 105. McLuhan occasionally spoke of "audile-tactile" man and offered such mysterious pronouncements as "speech is an outering (utterance) of all of our senses at once." MCLUHAN, *supra* note 3, at 43, 93. Neither scholar, however, was willing to concede the inadequacy of his "oral" terminology for describing sensory phenomena far more complex than the terms "oral intercourse" or "speech" would properly admit.

[29] The suggested chronological *termini* for the performance cultures identified here are, of course, approximate; in each instance, individual scholars differ slightly on when writing became a significant social force.



B.C.), early medieval Europe (to the end of the thirteenth century A.D.), and surviving indigenous communities in Africa, South America, Asia, and the Pacific.[30] At a deeper level, however, the term "performance culture" represents a radically different conception of preliterate and marginally literate communication. First, the general reference to "performance" in this context reflects the fact that in preliterate and marginally literate societies, significant information is delivered through many media and not just orally. Individuals in these societies are "performers" in the sense of being culturally fluent in speech, gesture, touch, smell, and taste. Second, the distinctly theatric connotation of "performance" makes it especially suited to the preliterate and marginally literate practice of employing several media at the same time in the same significant message. For both these reasons, as well as others, the phenomenon of "performance" has become the focus of much attention in the anthropological literature,[31] and using this word to replace "oral" as a broad cultural characterization seems only appropriate.

Such a reconception of how members of a particular group of societies communicate requires a reassessment of their forms of legal expression. Like all other types of meaning in performance cultures, law and legal understandings are conveyed not only orally, but also in gesture, touch, scent, and flavor. They are not only heard, but seen, felt, smelled, and tasted. The nature of some of the media used to carry legal messages in performance-based societies may seem quaint and even bizarre to us, but unlike ourselves, members of these cultures take all media seriously, and

[30] It is currently unfashionable to generalize across so many societies. It must be acknowledged, however, that in this age of academic super-specialization most historians and anthropologists "have a vested interest in the particularity of the individual culture that they have taken such pains to understand." Richard Posner, *Medieval Iceland and Modern Legal Scholarship*, 90 MICH. L. REV. 1495, 1501 (1992). What is more, if societies are allowed to defy comparison by virtue of their supposed uniqueness, "then one is condemning research in the human sciences . . . to a singular impoverishment." JACQUES LE GOFF, TIME, WORK AND CULTURE IN THE MIDDLE AGES 365 n.109 (Arthur Goldhammer trans., 1980).

[31] *See, e.g.*, RICHARD BAUMAN, VERBAL ART AS PERFORMANCE (1977); STUART H. BLACKBURN, SINGING OF BIRTH AND DEATH: TEXT IN PERFORMANCE (1988); JOHANNES FABIAN, POWER AND PERFORMANCE: ETHNOGRAPHIC EXPLORATIONS THROUGH PROVERBIAL WISDOM AND THEATER IN SHABA, ZAIRE (1990); ELIZABETH FINE, THE FOLKLORE TEXT: FROM PERFORMANCE TO PRINT (1984); Richard Bauman & Charles L. Briggs, *Poetics and Performance as Critical Perspectives on Language and Social Life*, 19 ANN. REV. ANTHROPOLOGY 59 (1990); John M. Foley, *Word-Power, Performance, and Tradition*, 105 J. AM. FOLKLORE 275 (1992); Scheub, *supra* note 16.

therefore do not hesitate to use all available media forms to communicate serious legal information. Frequently used in combination, these forms serve the same functions, and thus deserve the same respect, as the lengthy documents that often replace them in our society.

In order to provide the reader with direct evidence for these contentions and a proper context in which to set them, I will devote part II of this Article to considering how members of different performance cultures use or have used each of the basic sensory media to communicate general and legal meaning. First, I will review the significance and sorts of aural communication in a variety of performance cultures, and investigate how law is aurally expressed in those environments. This portion of the Article will necessarily draw on work already done by disciples of "orality," although I will highlight aural forms of communication and legal expression that frequently are overlooked. I will then turn to conceptions and forms of performative visual communication, and will consider the varieties of visual legal expression in performance-based societies. A brief examination of the significance of tactile communication in performance cultures will follow, leading to a survey of tactile modes of conveying legal information. From that point, I will investigate methods of performative communication that use the savory senses of smell and taste, and will analyze how those media are put to legal purposes. In part III, I will discuss how and why members of performance cultures "perform," that is, combine various media in single messages, and will describe how and why they use the same communicative strategy in legal expression. In that part, I will also consider how information may be distributed among the different sensory components of performance and will assess what that distribution means for our interpretation of performative culture and law. The conclusion will put all this material in perspective, and for the purpose of introducing the reader to the subject of a future paper, it will offer a few preliminary hypotheses concerning the deeper implications of performance for the cultural practices and legal values of the societies it dominates.

While following this discussion, the reader should bear in mind five points—two methodological and three substantive. First, this Article is only an impressionistic survey of forms of communication and legal expression found in performance cultures. Because of the uneven nature of the available source material, parts of this survey are necessarily less elaborate than others. Far from providing answers, existing general and legal



literature frequently fails to pose the questions that must be asked before more detail can be added. In the meantime, I ask the reader to pardon any lacunae in the text.

Second, despite my analytic separation of modes of general expression from modes of legal expression, I do not mean to suggest the existence of some great divide between culture and law. On the contrary, I believe that law is very much embedded in culture. This is especially true in performance-based societies where law largely lacks the refuge of writing, which can fix it physically, isolate it intellectually, and hence shelter it from general cultural currents. Separating culture from law is nonetheless a convenient stylistic device that allows me to associate and analogize cultural and legal practices while highlighting the latter for a reading audience composed of legal scholars and specialists.

Third—turning to substantive as opposed to methodological matters—nothing I say in these pages is meant to suggest that all performance cultures are absolutely alike. Compared to other societies, their forms of communication and legal expression are sufficiently similar for them to be considered members of a single cultural group, but that does not make them identical in all respects. Specific performative communities are shaped not only by their common media, but also by particular geographic, historical, political, economic, and religious circumstances. Different performance cultures may even function in subtly different communicative environments. For example, early medieval Europe may be distinguished from most African performance cultures in that the former had a writing-oriented past, and in its present embraced a faith officially founded on God's written word.[32]

Fourth, the reader must not mistake this Article's association of particular forms of communication and legal expression with performance cultures for a claim that those forms are necessarily peculiar to those cultures and necessarily disappear with the spread of writing. Even when writing becomes a significant social force, traditional expressive forms persist. Judging from the historical experiences of such emergent "writing cultures" as Hellenistic Greece, Imperial Rome, and late medieval Europe,[33]

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[32] Julia M. Smith, *Oral and Written: Saints, Miracles and Relics in Brittany, c. 850-1250*, 65 SPECULUM 309, 311 (1990). The latter quality would also distinguish biblical Israel.

[33] In this Article, I reluctantly use the term "writing culture" as the most convenient shorthand

the initial popularization of writing decreases the extent of social and legal dependence on nonwritten media and in the process renders them less powerful and less dispositive.[34] Many people nonetheless continue to use those media to considerable social and legal effect.[35] This is especially true of individuals belonging to marginalized social and gender groups (usually the poor and women) that have little or no educational access to writing. In the short term, the popularization of writing may even favor the elaboration of certain nonwritten forms of expression with which writing, as a medium, is broadly compatible (that is, two-dimensional painting and drawing, as opposed to three-dimensional sculpture).[36]

label for societies that have had enough experience with writing to significantly and perhaps even profoundly alter their preliterate habits of expression and thought. In this context, it should be apparent that a "writing culture" is not simply a culture that possesses the technology of writing, but rather is one that has significantly assimilated or "interiorized" that medium. Ancient Mesopotamia and Hellenic Greece cannot, therefore, be classified as "writing cultures," despite the fact that a good number of individuals within those societies could write. It should also be noted that in this Article, "writing" in the context of the term "writing culture" refers to an intellectual skill (in the sense of the general ability to "read and write"), as opposed to physical "handwriting" or "script." Thus, although the culture of Hellenistic Greece was largely based on manuscripts and the culture of modern America is based on printed books, both societies are, broadly speaking, "writing cultures." Having said this, I would agree that the technological and intellectual impact of print is different from that of script, to the point where one might draw a useful distinction between "script" and "print" cultures or, perhaps more accurately, between "graphic" and "text" cultures. *See infra* note 36. For present purposes, however, the distinction between script/graphic and print/text societies is less important than the basic discontinuity between performance-based societies and "writing cultures" as a whole.

[34] On the rise of writing and the concomitant decline in the autonomy and importance of traditional media in Hellenistic Greece, see PETER BING, THE WELL-READ MUSE: PRESENT AND PAST IN CALLIMACHUS AND THE HELLENISTIC POETS (1988); WILLIAM V. HARRIS, ANCIENT LITERACY 116-46 (1989); ERIC HAVELOCK, THE LITERATE REVOLUTION IN GREECE AND ITS CULTURAL CONSEQUENCES (1982). For late republican and Imperial Rome, see HARRIS, *supra*, at 175-284. For late medieval Europe, see MARGARET ASTON, LOLLARDS AND REFORMERS: IMAGES AND LITERACY IN LATE MEDIEVAL RELIGION (1984); JANET COLEMAN, MEDIEVAL READERS AND WRITERS, 1350-1400 (1981); HARVEY J. GRAFF, THE LEGACIES OF LITERACY 75-106 (1987); Paul Saenger, *Books of Hours and the Reading Habits of the Later Middle Ages*, *in* THE CULTURE OF PRINT: POWER AND THE USES OF PRINT IN EARLY MODERN EUROPE (Roger Chartier ed., 1988).

[35] One classical scholar has, for instance, commented that "the Greek and Roman worlds always remained highly dependent, by modern standards, on oral communication; this was true . . . even in the cities of . . . Hellenistic Greece and . . . the high Roman Empire." HARRIS, *supra* note 34, at 29. The difference between these cultures and their performative predecessors, therefore, is not that the former suppressed nonwritten forms, but rather that they no longer depended on those forms to carry the full weight of social and legal messages. Thus, while oral communication survived as an important medium, it lost a significant measure of its autonomy and authority, being increasingly used for dictating or reading written documents.

[36] It is this phenomenon that prompts me to prefer the term "graphic culture" to "script culture" as a specific characterization of such early writing cultures as Hellenistic Greece and late medieval



Fifth, finally, and in a related vein, the reader must remember that for all its attention to the practices of societies with little or no experience with writing, this Article is in some sense also about ourselves. As I stated at the beginning of this introduction, we all speak, sing, gesture, and so on, even if—under the influence of writing, as that influence has been extended and amplified by print technology[37]—we generally refrain from using those media to convey primary cultural information (including, almost by definition, most of our legal meanings). Moreover, we are living at a time when writing is rapidly losing its social and ideological hegemony. As it gradually gives way to such audio-visual media as television and computers,[38] our preferred styles of communication and legal expression will increasingly come to match the sensory capacities and prejudices of these new technologies. Perhaps by gaining a greater appreciation of communication and legal expression in cultures not dominated by writing, we may indirectly familiarize ourselves with (and prepare ourselves for) some of the forms that learning and law are likely to take once our own

Europe. *See supra* note 33. "Graphic" potentially denotes both chirographic (written) and iconographic (painted or drawn) representation and takes account of the intimate and fertile relationship that historically has existed between these forms, and which becomes especially powerful in societies that are just becoming familiar with writing (to appreciate this point, simply consider the splendid synthesis of chirography and iconography that is the medieval illuminated manuscript). "Script," on the other hand, denotes writing only and misleadingly suggests that early writing cultures are solely oriented towards the written word. Taking this analysis a step further, using the term "text culture" to specifically describe the writing culture of, say, nineteenth century Europe is preferable to using the term "print culture" because it more accurately communicates the cultural focus on written words—at the expense of pictures—that the technological and chromatic limitations of print have historically encouraged. I hope to elaborate on these distinctions and their social and legal implications in later papers.

[37] Because it is easier to produce and easier and cheaper to duplicate than script, print greatly facilitates the spread of written materials and literacy. Moreover, it is only under the impetus of print technology that a society can become so familiar and so suffused with the written word that its high literates can truly "afford" to challenge the authority of nonwritten media without fear of destroying the cultural corpus. Thus, the chronological coincidence between the growth of printing and the sensory upheavals that marked the Reformation. *See supra* notes 3-8 and accompanying text.

[38] Of course, writing is not about to disappear. In the short term, at least, it will simply take new, more overtly graphic forms and will be used in new, less autonomous ways. On the future of writing in our society, see JAY D. BOLTER, WRITING SPACE: THE COMPUTER, HYPERTEXT, AND THE HISTORY OF WRITING (1991); MYRON C. TUMAN, WORD PERFECT: LITERACY IN THE COMPUTER AGE (1992); Richard A. Lanham, *The Electronic Word: Literary Study and the Digital Revolution*, 20 NEW LITERARY HIST. 265 (1989). For a tantalizing glimpse into the world of "virtual reality," a computer-generated sensory cocoon in which the status and utility of writing will be far more problematic, see BENJAMIN WOOLLEY, VIRTUAL WORLDS: A JOURNEY IN HYPE AND HYPERREALITY (1992).

"age of writing" has passed.

## II. Communication and Legal Expression in Performance Cultures: A Tentative Typology

Before surveying the various types of communication and legal expression used in performance cultures, we must address, if not resolve, an evidentiary problem. Where exactly do we look for information on performative communication and legal expression, or for that matter, for any other information on performance cultures? Very few performance cultures survive in the modern world; the contemporary base of our cultural sample is thus profoundly limited. A greater number of performance cultures existed in the late nineteenth and early twentieth centuries, but the Western ethnographers and anthropologists of that age were not much interested in communication. When they did show an interest, bias, prejudice, and unscientific methodology often compromised their research. The historical record of past performance cultures is more problematic still. Much of what we know of them is a function of what some of their members chose to write down or draw. Unhappily, many aspects of performative experience escape or resist transcription and even depiction. Notwithstanding the best of intentions on the part of early record-keepers, much sensory information from these societies must have been lost.[39]

Abandonning our investigations in the face of such difficulties would nonetheless be both premature and unfortunate. In recent years, unprecedented effort has been expended on studying the performance cultures that remain. For all its problems, the anthropological and ethnographical research of the late nineteenth and early twentieth centuries yielded a significant amount of information on communication and legal expression in performance-based societies that is consistent with more recent and more overtly scientific findings. Finally, the rudimentary graphic record of past performance cultures, regarded critically in light of what we know of

[39] Something of this problem—in a slightly different context—is reflected in an experience Sir Walter Scott once had when he showed an old Scotswoman the printed texts of songs he had written down from her singing: "the old woman was more annoyed than amused. He had spoiled them altogether, she complained. 'They were made for singing and not for reading, but ye have broken the charm now and they['ll] never be sung mair. An the worst thing o'a' is, they nouther right spelled, no right setten down.' " The Viking Book of Folk Ballads of the English-Speaking World ix (Albert B. Friedman ed., 1956).



performative habits from other sources, offers invaluable insights into performative life-, thought- and law-ways. Recognizing the potential impact of drawing and especially writing on the contents of the record, we might consider that record with particular care, but it would be tragic to throw the performative baby out with its bathwater.

### A. *Aural Communication and Legal Expression*

#### 1. *The Cultural Significance of Sound*

Performance cultures are invariably societies of sound. To this limited extent, their frequent characterization as "oral" cultures is undeniably accurate. Outsiders from a writing culture might consider them noisy or loud,[40] but this somewhat pejorative assessment fails to take account of the fundamentality of aural communication for groups that have little or no access to writing. This fundamentality is reflected in many performative metaphors of knowing and understanding. Whereas a member of our visually oriented writing society might acknowledge a point with the expression "I see," members of a significant number of performance cultures use aural idioms. When Aivilik Eskimos seek information, they say to others or to themselves, "let's hear."[41] The African Basotho consider "I hear" to be equivalent to "I understand,"[42] as do the Suya Indians of

[40] Mitchell Stephens, A History of News 24 (1988). This passage from a recent sociological study nicely captures the "loudness" of early medieval culture:

> Noises permeated the streets of the medieval city from dawn to dusk. Street criers were everywhere and kept up their business at all hours of the day. [They] proclaimed at dawn that the baths were open and the water hot; then followed bawling vendors advertising fish, meat, honey, onions, cheese, old clothes, flowers, pepper, charcoal, or other wares. Friars from different religious orders swarmed over the city, demanding alms. Public criers announced death and other news. Street musicians provided entertainment but also could annoy those with well-attuned ears.

Yi-Fu Tuan, Segmented Worlds and Self: Group Life and Individual Consciousness 126 (1982). On loudness and noisiness as socially-approved characteristics of personal deportment in medieval Anglo-Saxon society in particular, see Bruce Redwine, Decorum and the Expression of Intention in "Beowulf," "Njal's Saga" and "Chaucer" 75-89 (1984) (unpublished Ph.D. dissertation, University of California (Berkeley)). Redwine notably suggests that by Chaucer's lifetime (the middle to late fourteenth century, by which point England had made the transition from a performance culture to a writing culture), English decorum had come to favor soft sounds, if not outright silence. Loud behavior was regarded as boorish and was openly ridiculed. *Id.* at 216-24.

[41] Edward Carpenter et al., Eskimo 25 (1959).

[42] Charles R. Adams, *Aurality and Consciousness: Basotho Production of Significance*, *in* Essays in Humanistic Anthropology: A Festschrift in Honor of David Bidney 309 (Bruce

central Brazil.[43] Among the Ommura people of New Guinea, the verb *iero* likewise means both "to hear" and "to know."[44] The word that the pre-classical Greek philosopher and scientist Heraclitus used to mean "know" (*ksuniemi*) originally meant "to know by hearing."[45] In the early fourth century B.C., Plato still equated individuals who knew much with individuals who heard much.[46] Sound and hearing may even be metaphorical measures of wisdom: in ancient Norse mythology, the guardian of heaven, Heimdallr, was so wise "that he could hear the wool grow on the sheep and the grass grow in the fields."[47] Conversely, members of performance cultures tend to identify idiocy with lack of hearing. Among one group of Australian aborigines, the word for "deaf" (*woadetra*) also means "stupid"; in another group, the foolish individual (*wallukuta*) literally has his "ear closed."[48]

In addition to shaping its language, sound can also shape the very size of a performative community. The first "sound barrier" in human history was the geographic point at which individuals lost aural contact with one another or with a central authority. Still fearing the social and practical consequences of breaking this barrier in the early fourth century B.C., Aristotle argued against having too many people in a city: "Who will be their crier unless he has the voice of a Stentor?"[49] In the Middle Ages,

Grindal & Dennis Warren eds., 1979).

[43] Anthony Seeger, *The Meaning of Body Ornaments: A Suya Example*, 14 ETHNOLOGY 211, 213 (1975).

[44] David Howes, *Controlling Textuality: A Call for a Return to the Senses*, 32 ANTHROPOLOGICA 55, 65 (1990).

[45] Evelyn F. Keller & Christine R. Grontkowski, *The Mind's Eye*, *in* DISCOVERING REALITY: FEMINIST PERSPECTIVES ON EPISTEMOLOGY, METAPHYSICS, METHODOLOGY AND PHILOSOPHY OF SCIENCE 207, 221 (Sandra Harding & Merrill B. Hintikka eds., 1983).

[46] ROSALIND THOMAS, ORAL TRADITION AND WRITTEN RECORD IN CLASSICAL ATHENS 21 (1989).

[47] Alexander Chamberlain, *Primitive Hearing and "Hearing-Words,"* 16 AM. J. OF PSYCHOL. 119 (1905).

[48] *Id.* at 127. On similar metaphorical identities in Indochinese languages, see George Devereux, *Ethnopsychological Aspects of the Terms 'Deaf' and 'Dumb,' in* VARIETIES, *supra* note 17, at 43-44. In a fascinating article, anthropologist Anthony Seeger has suggested that another indicator of the special importance of aural communication in several preliterate societies is the tendency of their members to decorate and ornament those parts of the human body relevant to the creation or appreciation of sound. The efforts of the Suya people to highlight their mouths and ears with large ornaments thus reflect the prominence accorded to speaking and hearing in that culture. *See generally* Seeger, *supra* note 43.

[49] ARISTOTLE, THE POLITICS 7.4 (Thomas A. Sinclair trans., 1962).



few villages were larger than the range of the crier's voice. Larger towns (perhaps recognizing Aristotle's problem) were subdivided into smaller, more aurally manageable wards.[50] The territorial sweep of Christian parishes was similarly delimited by the range of their churchbells.[51]

As a medium, sound can of course take several forms. Most obviously, it exists as speech. In a performance culture, speech has far greater power and authority than it usually has in a writing culture. It is commonly regarded as a force capable of both creating and destroying. Heeding the words of *Genesis*, the ancient Hebrews believed that God made the universe by speaking ("And God said 'Let there be light,' and there was light. . . ").[52] On the other hand, members of a variety of performative societies in contemporary Africa avoid using certain words in certain ways lest they do material harm to other persons or things.[53]

Members of performance cultures additionally respect speech because it carries their society's most cherished truths. Performative wisemen are primarily talkers, not writers. Socrates, one of the last Greek sages to live in a performative environment, never wrote down any of his thoughts. This was not due to carelessness or lack of rigor; it was merely reasonable behavior for an individual who had grown up in a society where speech was the common coin of intellect. Only after Socrates' death did writing begin to make serious intellectual headway in Greek culture, with the result that Plato, Socrates' disciple, decided to record his own thoughts in written form. These writings nonetheless took the form of "dialogues" which, when read aloud according to prevailing literary practice,[54] pointedly recalled the central dynamic of performative aurality.

The social and intellectual prominence of speech among populations

[50] JAMES BURKE, THE DAY THE UNIVERSE CHANGED 92 (1985).

[51] J. DOUGLAS PORTEOUS, LANDSCAPES OF THE MIND: WORLDS OF SENSE AND METAPHOR 50 (1990).

[52] *Genesis* 1:3 *et seq.* (Revised Standard Version). On the power of speech in Hebrew tradition, see SUSAN A. HANDELMAN, THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY 17, 32-34 (1982).

[53] Philip M. Peek, *The Power of Words in African Verbal Arts*, 94 J. AM. FOLKLORE 19 (1981).

[54] William B. Stanford, *Sound, Sense and Music in Greek Poetry*, 28 GREECE AND ROME 127 (1981). Oral reading of written works similarly typified the Middle Ages, although the habit became less common as literacy rates increased in the thirteenth century and afterward. *See* Ruth Crosby, *Oral Delivery in the Middle Ages*, 11 SPECULUM 88 (1936); Paul Saenger, *Silent Reading: Its Impact on Late Medieval Script and Society*, 13 VIATOR 367 (1982).

with little or no experience with writing inevitably gives great prestige and power to good speakers. Judging from the *Odyssey*, the Homeric Greeks regarded fine speakers as divinely blessed:

> For one man is feebler than another in presence, yet the god crowns his words with beauty, and men behold him and rejoice, and his speech runs surely on his way with a sweet modesty, and he shines forth among the gathering of his people, and as he passes through the town men gaze on him as a god.[55]

African Limba culture likewise assesses people according to their ability to "speak well."[56] Some performative societies even name themselves in terms of their speech-skills. For instance, the name of the African Anang people actually means "ability to speak wittily yet meaningfully on any occasion."[57]

The inherent aurality of speech encourages members of performance cultures to organize language in ways that are pleasing to the ear. One reason why poetry is a leading type of performative expression is that, with the assistance of rhythm and meter, it sounds better then prose.[58] In this context, it is no accident that the greatest literary works of pre-Hellenistic Greece, Anglo-Saxon England, and early medieval Europe (the *Iliad*, *Beowulf*, and the *Song of Roland*) were, in their original forms, all poems. Within poetry, and even at times within the confines of everyday performative speech, additional aural devices such as alliteration and assonance may be used to highlight similar consonant or vowel sounds by placing certain words in sequence. This passage from *Beowulf* is a nice example of alliteration:

[55] THE ODYSSEY OF HOMER 8.169-.173 (S.H. Butcher & A. Lang trans., 1900).

[56] Ruth Finnegan, *Attitudes to Speech and Language Among the Limba of Sierra Leone*, 2 ODU 61, 70 (1968).

[57] DICK LEITH & GEORGE MYERSON, THE POWER OF ADDRESS: EXPLORATIONS IN RHETORIC 33 (1989).

[58] On the cultural prominence of poetry in preliterate societies in particular, see DENYS THOMPSON, THE USES OF POETRY 77-85 (1978). In ancient Greece, "Prose as the medium of important communication was slow in developing, and even after its appearance, it retained acoustic devices . . . as late as the fifth and fourth centuries." Kevin Robb, *Greek Oral Memory and the Origins of Philosophy*, 51 PERSONALIST 5, 28 (1970). For a comprehensive study of the shift from poetry to prose in late medieval Europe after the initial, albeit limited, rise of "popular" literacy there, see WLAD GODZICH & JEFFREY KITTAY, THE EMERGENCE OF PROSE (1987).



> Straet waes, stig wisode
> gumum aetgaedere. Gudbyrne scan
> heard, hondlocen, hringiren scir
> song in searwum.[59]

The impact of these words is largely lost if they are silently read instead of spoken, that is, if language is considered a matter of sight rather than sound. It is therefore not surprising that the use of these techniques and even the social significance of poetry itself should decline in writing cultures.

In addition to speech, sound can also take the form of music. Music is ubiquitous in most performance cultures. Of course, the line between speech and music is hardly sharp: song shares characteristics of both. The great epics of our own performative past appear to have been sung, or at least chanted. Homer's word for "poet" was notably *aoidos*, or "singer."[60] Frequently, poems were presented with instrumental accompaniment. One thus envisions the Greek *kitharode* with a lyre, and the Anglo-Saxon *scop* with a harp. Among the indigenous peoples of Africa, the presentation of epic poetry remains as much a musical as a linguistic event: a performance may involve singing, humming, strumming strings, shaking rattles, beating drums, or ringing bells and gongs.[61]

In performance cultures, however, music has other roles that are much less obvious to members of writing societies who tend to think of it as mere entertainment. The ancient Greeks, for instance, gave music a central place in schooling. The leader of the early Greek classroom was not a "lecturer," but a "harpist," reflecting the importance of music in transmitting the epics that carried Greek knowledge and tradition from generation to generation.[62] In the early fourth century B.C., Plato could still

[59] BEOWULF vv. 320-23 (Michael Swanton ed., 1978). Only some of this passage's alliterative qualities are preserved in translation: "The road was paved with stone, a path guiding the group of men. The war-mail shone, hard with hand-forged links; the bright iron rings sang on their armour." *Id.* For a discussion of similar aural structures in Greek poetry, both before the fifth century (until which time "all Greek poets made their poems for hearing not for seeing, for the ear and not for the eye") and after (when written poetry was still read aloud), see Stanford, *supra* note 54, at 127.

[60] Robb, *supra* note 58, at 42 n.29. On the singing and chanting techniques that may have been used by the Homeric poets, see M.L. West, *The Singing of Homer and the Modes of Early Greek Music*, 101 J. HELLENIC STUD. 113 (1981).

[61] ISIDORE OKPEWHO, THE EPIC IN AFRICA 62-63 (1979).

[62] HAVELOCK, *supra* note 20, at 124. In belated recognition of the pivotal role of music and, more specifically, song in shaping the lives, lore, and learning of the early Greeks, a number of

assert that the well-educated man was "one sufficiently trained in choral performances" so that he could "sing and dance in a fine way."[63] Members of performative societies in contemporary Africa consider music a necessary foundation for most meaningful social action. Thus,

> [I]n the Republic of Benin there are special songs sung when a child cuts its first teeth; among the Hausas of Nigeria, young people pay musicians to compose songs to help them court lovers or insult rivals; men working in a field may consider it essential to appoint some of their number to work by making music instead of putting their hands to the hoe; among the Hutus, men paddling a canoe will sing a different song depending on whether they are going with or against the current.[64]

In this context, music's aurality makes it an integral part of life, as opposed to a special cultural event.

Finally, members of performance cultures aurally communicate with one another by miscellaneous sounds. Members of modern writing cultures frequently experience such sounds as grating intrusions appropriate only in emergencies (one thinks of the honking of a horn or the blaring of a siren). They are almost never employed in regular communication. In performance cultures, however, sounds are the very stuff of life, pregnant with emphasis and important meanings. Sounds effectively attract attention and frequently can carry further than speech or song. In north African Siwan society, for instance, the air may be filled with the ritual wailing of bereaved relatives. This is not an immature "noise," an aural nuisance, or an inconvenience.[65] It is, instead, a useful manner of communicating a death over a wide geographic area.[66] Through the Middle Ages, church bells played an analogously public role, summoning the

scholars have recently come to characterize early Greek society as a "song culture." *See* ANDREW FORD, HOMER: THE POETRY OF THE PAST 14-16 (1992); JOHN HERRINGTON, POETRY INTO DRAMA: EARLY GREEK TRAGEDY AND THE GREEK POETIC TRADITION 3-40 (1985).

[63] PLATO, THE LAWS 2.654b (Trevor J. Saunders trans., 1970).

[64] JOHN M. CHERNOFF, AFRICAN RHYTHM AND AFRICAN SENSIBILITY 34 (1979); *see also* LEONARD W. DOOB, COMMUNICATION IN AFRICA: A SEARCH FOR BOUNDARIES 79 (1961); KEVIN B. MAXWELL, BEMBA MYTH AND RITUAL: THE IMPACT OF LITERACY ON AN ORAL CULTURE 4 (1983).

[65] The notion of sound being a nuisance or an inconvenience ("noise pollution") seems to be peculiar to writing cultures (and within that broad category, "text cultures"), whose members need no longer rely on sound for the propagation of cultural information.

[66] STEPHENS, *supra* note 40, at 24.



faithful to Mass, warning local populations of raids and dangers, and otherwise tolling the hours. In an aurally sophisticated environment, everyone knew that different peals had different meanings.[67] Loud noises—such as the striking of drums or the explosion of firecrackers—still mark and communicate important life transitions among certain African and Far Eastern societies that have not been completely overtaken by writing.[68] The sounds serve as aural exclamation marks for communities that continue to live by and through their ears.[69]

### 2. *The Sound of Law*

Even in the midst of a writing culture, Anglo-American law has retained a significant measure of actual and metaphorical aurality.[70] This is especially evident in criminal procedure. In both England and America, the accused is due a "hearing"; lawyers for the defense and for the prosecution call orally sworn witnesses who, under oral questioning, offer oral testimony. Jurors are required to listen to that testimony, to oral arguments, and to the eventual instructions from the judge. In a few jurisdictions,[71] jurors are not even permitted to take notes of what they hear. After deliberation, they return to declare their verdict orally. The court, after hearing further oral submissions, literally "pronounces" sentence.

The aurality that survives in Anglo-American law is nonetheless rigidly confined by rules and regulations that more accurately reflect the plight of sound in our society. In court, for instance, the "ear-witness" is anathema; there are strict rules against hearsay, or reporting what one has heard as opposed to what one has seen. Oral evidence is often inadmissible in the

[67] JOHAN HUIZINGA, THE WANING OF THE MIDDLE AGES 10 (1949). On the communicative role of church bells in the Middle Ages, see generally SOPHIA MENACHE, THE VOX DEI: COMMUNICATION IN THE MIDDLE AGES 30 (1990).

[68] *See* Rodney Needham, *Percussion and Transition*, 2 MAN 606, 606 (1967). Similar noise-making takes place in our own writing culture (*e.g.*, honking of horns and clanging of tin cans after weddings), but the practice is generally more celebratory than communicative. We prefer other means of publicizing and preserving the memory of important events.

[69] I would like to thank Carrie Cottreau for this apt metaphor.

[70] This statement is not, however, meant to imply that the English and American legal systems retain *equivalent* measures of aurality. Scholars have long recognized that under the weight of considerable tradition, English law has preserved a greater number of oral forms and practices than has its American counterpart. *See, e.g.*, ROBERT J. MARTINEAU, APPELLATE JUSTICE IN ENGLAND AND THE UNITED STATES: A COMPARATIVE ANALYSIS (1990) (in particular chapter 3).

[71] One such jurisdiction is Pennsylvania. *See* 234 PA. CODE § 1113 (1985).

face of an adequate written instrument. In American civil cases, judicial opinions are not delivered orally, but instead are published in accordance with statutes. Out of court, oral conveyances of significant interests in land are expressly forbidden, as are virtually all oral wills. In these latter contexts especially, Anglo-American law and lawyers are inclined to associate aural communication with fraud, carelessness, and lack of legal sophistication.

These circumstances and attitudes stand in stark contrast to those prevailing in performance cultures, where law is aural not because of tradition or ignorance, but because of necessity.[72] For instance, in the absence of writing, or in a context where writing is still a marginal social talent, it is either impossible or inconvenient for the parties to a contract to agree to anything "on paper." If language is to be employed at all, promisor and promissee must orally set the terms of their agreement in the presence of listening witnesses. Thus, in Rome at the time of the *Twelve Tables* (fifth century B.C.), parties routinely bound themselves by an oral question-and-answer process called *stipulatio*. A creditor might ask a debtor: "*Sestertium decem milia mihi dari spondesne*?" ("Do you promise to give me ten thousand *sesterces*?"). The debtor would reply: "*Spondeo*" ("I promise").[73] Among the African Basotho people, similar oral agreements are actually called "soundings."[74]

Oral communication is also prominent in performative conveyances. In tenth century England, a grantor wishing to transfer land would have made a speech like the following to his grantee and to witnesses: "I the priest Athelnoth, grant the estate at Basing with all the lands King Edmund has given me, to the New Minster at Winchester for the benefit of my soul, with the right of giving it to strangers and kinsmen with all the freedom which King Edmund has given me."[75] A written charter might

[72] In performance cultures, the dependence of law on aural communication is so great that deaf-mutes (individuals who cannot speak because they have never been able to hear) may be deemed incapable of holding legal privileges and bearing legal obligations. For instance, in medieval Europe until the twelfth century, deaf-mutes were not allowed to marry on the presumption that they could not understand the meaning of the marriage ceremony. HARLAN LANE, WHEN THE MIND HEARS: A HISTORY OF THE DEAF 93 (1984).

[73] Peter M. Tiersma, *Rites of Passage: Legal Ritual in Roman Law and Anthropological Analogues*, 9 J. LEGAL HIST. 3, 8 (1988).

[74] Adams, *supra* note 42, at 310.

[75] ANGLO-SAXON CHARTERS 55 (Agnes J. Robertson ed. & trans., 2d ed. 1956).



capture what was said (as appears to have been the case here), but in early medieval conveyancing law, the saying mattered more than the writing. Indeed, land charters in early medieval England were considered as either records of sayings or (less frequently) scripts for sayings: their contents were intended to be both seen and heard, to the point where scribes concluded many charters with *valete* ("goodbye"), "as if the donor had just finished speaking with his audience."[76]

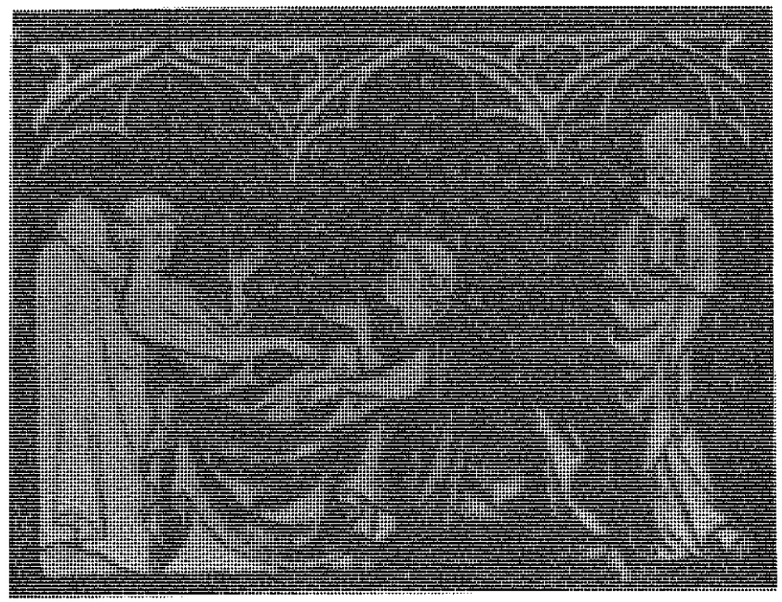

FIGURE 1. Speaking a will. In this miniature from a medieval French manuscript of Gratian's *Decretum* (composed c. 1140), a bedridden cleric declares his testamentary wishes to a colleague.

A man contemplating death in a performance culture likewise does not write or sign his will; instead, he spcaks his testamentary wishes to indi-

[76] MEMORY, *supra* note 2, at 202. The use of *valete* may also have reflected the standard Roman (Latin) form for finishing a letter, but one has to remember that the classical practice of letter-writing itself had oral roots; even after writing had pushed Rome beyond "performance culture," people in a society that was still significantly short of universal literacy still intended letters to be read aloud, just as they were dictated aloud.

viduals gathered around him (see Figure 1). In the early Roman Republic, wills were pronounced before the *Comitia Curiata* (*testamentum calatis comitiis*), before the army arrayed for battle (*testamentum in procinctu*), or before five special witnesses (*testamentum per aes et libram*).[77] The orality of early English wills[78] was sometimes reflected in testators' very words. The conclusion of one Anglo-Saxon will, embodied in writing for convenience, thus began: "Then I will that there be distributed for my soul, as I have now said to the friends to whom I spoke . . . ."[79] Another Anglo-Saxon document implied an oral delivery by its casual reference to a bystander: "Here sits Leofeld, my kinswoman, [to] whom I grant both my land and my gold . . . and all that I own, after my day."[80] Thanks to the form of the words, we can also "hear" this eleventh century will spoken from a deathbed and afterwards recorded in the *Domesday Book*: "Hark, my friends. I will that my wife shall hold this land which I bought from the Church as long as she lives, and after her death let the Church from which I had it take it. And should anyone encroach on this land let him be excommunicated."[81] Down to the thirteenth century, it remained commonplace for an Englishman to make his will "with his mouth" in this fashion.[82]

The edicts or rules that are the more general laws of a performative community are similarly publicized and perpetuated by speech. They are, as they are still literally called in Yup'ik Eskimo culture, "oral teachings."[83] They may be transmitted informally, from generation to generation, or alternatively they may be formally proclaimed to the people at large. During the Republic and even in the days of the Empire, Roman

[77] ALAN WATSON, ROMAN LAW AND COMPARATIVE LAW 77 (1991).

[78] On the orality of Anglo-Saxon wills in particular, see Brenda Danet & Bryna Bogoch, *From Oral Ceremony to Written Document: The Transitional Language of Anglo-Saxon Wills*, 12 LANGUAGE AND COMM. 95 (1992); Harold D. Hazeltine, *Comments on the Writings Known as Anglo-Saxon Wills*, *preface to* DOROTHY WHITELOCK, ANGLO-SAXON WILLS vii (1930).

[79] Burton F. Brody, *Anglo-Saxon Contract Law: A Social Analysis*, 19 DEPAUL L. REV. 270, 286 (1969) (quoting BENJAMIN THORPE, DIPLOMATARIUM ANGLIEUM AEVI SAXONICI 500 (1865)).

[80] Hazeltine, *supra* note 78, at xxx n.2 (quoting JOHN KEMBLE, CODEX DIPLOMATICUS AEVI SAXONICI 755 (1839)).

[81] *Id.* (quoting DOMESDAY BOOK 1, f. 177a).

[82] MICHAEL M. SHEEHAN, THE WILL IN MEDIEVAL ENGLAND: FROM THE CONVERSION OF THE ANGLO-SAXONS TO THE END OF THE THIRTEENTH CENTURY 186 (1963).

[83] ANN FIENUP-RIORDAN, ESKIMO ESSAYS: YUP'IK LIVES AND HOW WE SEE THEM 205 (1990).



heralds read statutes and decrees aloud.[84] Anglo-Saxon kings dictated their dooms in solemn *witans* (assemblies).[85] According to a mid-thirteenth century manuscript of the Icelandic *Konungsbók*, "lawspeakers" appearing before the general assembly were required to recite "all the sections of the law over three summers and the assembly procedure every summer."[86] In thirteenth century England, Henry III ordered his decrees "to be proclaimed as law by the voice of a crier," a strategy that was certainly effective in growing urban centers such as London, although it may have been less practical in rural areas.[87] Among the Nigerian Yoruba people, new legislation was traditionally announced by a town crier who was instructed to "go to every corner of the town, proclaiming and declaring the same in the hearing of the public."[88] The significance of law's oral proclamation tends to be recognized even in those performance cultures possessing rudimentary written laws. Thus, in early medieval Europe, "what mattered in the promulgation and enforcement of law remained the [oral] *word*, whether of the king, his wise men, the judges or the local legal experts."[89]

When performative laws are broken or legal rights are asserted, speech takes on new meaning and significance. Individuals charged with an offense or legal wrong are not served with written process, but are summoned orally. In early medieval England, oral summons were frequently delivered "by the crier's voice."[90] In the early Republic, Roman defendants were summoned by the voice of the complainant himself, a practice reflected in the famous opening formula of the *Twelve Tables*: "If a man calls another to law, he shall go."[91] Complainants similarly spoke out in early medieval Iceland, where the word for a "legal claim" (*mál*) notably

[84] Callie Williamson, *Monuments of Bronze: Roman Legal Documents on Bronze Tablets*, 6 CLASSICAL ANTIQUITY 160, 164 (1987).

[85] HENRY R. LOYN, THE GOVERNANCE OF ANGLO-SAXON ENGLAND 500-1087, at 108 (1984).

[86] LAWS OF EARLY ICELAND 187 (Andrew Dennis ed. and trans., 1980).

[87] MEMORY, *supra* note 2, at 212 (quoting MATTHEW PARIS, 3 MATTHEI PARISENSIS CHRONICA MAJORA *in* ROLL SERIES LVII 35 (H.R. Luard ed., n.p. 1872-1884)).

[88] DOOB, *supra* note 64, at 245 (quoting I.C. Ajisafe, THE LAWS AND CUSTOMS OF THE YORUBA PEOPLE 22 (1924)).

[89] Patrick Wormald, *Lex Scripta and Verbum Regis: Legislation and Germanic Kingship, from Euric to Cnut*, *in* EARLY MEDIEVAL KINGSHIP 123 (P.H. Sawyer & Ian N. Wood eds., 1977).

[90] MEMORY, *supra* note 2, at 220 (quoting RICHARD FITZNEALE, THE COURSE OF THE EXCHEQUER [DIALOGUS DE SCACCARIO] 116 (Charles Johnson ed. and trans., 1950)).

[91] HERBERT F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 179 (1939) (original in Latin).

also meant "speech."[92] The dangers associated with summoning defendants in this direct manner are evidenced by this excerpt from the Icelandic *Ljósvetninga Saga*:

> The winter passed uneventfully. In the spring the Norwegian went to collect the payment on his wares, but Solmund gave a curt response. He said the goods were rotted and that he wouldn't pay. The Norwegian went home, and a short time later he went together with Forni and Arnor to summon Solmund. . . . The three brothers listened for a while from their fortified house. Solmund said it was clear that they shouldn't put up with this sort of thing. Soxolf then jumped into action, seized his spear, and hurled it at the Norwegian; it killed him on the spot.[93]

It was somewhat safer to make an oral complaint before a communal assembly. *Njal's Saga* provides an Icelandic instance of such a public declaration:

> I give lawful notice against Flosi Thordarson . . . in that he did inflict on Helgi, son of Njal, an internal wound or a brain wound or a marrow wound which did cause Helgi's death. I demand that he be made an outlaw. . . . I give [lawful] notice to the Quarter Thing which has lawful jurisdiction over this matter. I give lawful notice. I give notice in the hearing of all at the Law Rock.[94]

When individuals from performance cultures commence formal litigation to resolve a dispute, they submit no briefs and file no motions. Instead, they speak, argue, and swear oral oaths before judges, mediators, or other authorities who ask oral questions of them and of their witnesses. If written evidence for or against a claim exists, that evidence tends to be suspect (largely due to the great danger of fraud and forgery in what is, at best, a marginally literate society) and may have to be supported by oral testimony, as often occurred in early medieval England.[95] Writings more-

[92] Jeffrey L. Slusher, *Runic Wisdom in Njal's Saga and Nordic Mythology—Roots of an Oral Legal Tradition in Northern Europe*, 3 CARDOZO STUD. L. & LITERATURE 21, 31 (1991).

[93] Ljosvetninga Saga, *reprinted in* THEODORE M. ANDERSSON & WILLIAM I. MILLER, LAW AND LITERATURE IN MEDIEVAL ICELAND 121, 124 (1989).

[94] Slusher, *supra* note 92, at 26-27 (quoting NJAL'S SAGA ch. 141 (Magnus Magnusson & Hermann Pálsson trans., 1960)).

[95] MEMORY, *supra* note 2, at 209-21. On the analogous suspicion of written evidence in Hellenic Greece, see TONY M. LENTZ, ORALITY AND LITERACY IN HELLENIC GREECE 77 (1989); on the dimensions of the fraud problem in Greek society, see George M. Calhoun, *Documentary Frauds in Litigation at Athens*, 9 CLASSICAL PHILOLOGY 134 (1914).



over tend to be read aloud in performative legal proceedings, not merely for the convenience of the many illiterates who may be present, but also for the convenience of literates still living in an aurally oriented society.[96] Greek orators were known to demand the public reading of particular decrees from inscribed *stelai*.[97] A defendant in a 1219 warranty of charter case from Lincolnshire similarly claimed a hearing of his father's charter, which appears to have been produced and publicly read.[98]

Performative disputes are quite literally talked out. In the language of the African Limba people, the word for "law case" (*hugbonkila ha*) also means a "speaking."[99] Cases are orally decided. Voices rather than writings make the law. The case record does not exist on any paper, but in the aural memories of those present. If a case is appealed or doubted, the case record must be presented orally by persons who heard the case argued and resolved. In Archaic and Hellenic Greece, these individuals were formally called *mnemones* or "remembrancers."[100] Medieval Europe knew of no such officials, but one medieval authority advised the would-be suitor to collect his friends in court, and "to pray them to be attentive to the words which are spoken in the pleadings; to hear well and to recollect well, in order that they may be able to record the plea when need shall require."[101]

The aurality of performative law is reflected not only in the many occasions when law is spoken, but also in the aurally appealing structures employed in law-speaking. For instance, early German and Anglo-Saxon legal language was strongly rhythmic and metrical, reflecting its audience's love of alliteration and assonance. Consider (or, better still, recite) this Anglo-Saxon oath of fealty, which preserves its aural characteristics

[96] MEMORY, *supra* note 2, at 215.

[97] THOMAS, *supra* note 46, at 64.

[98] ROLLS OF THE JUSTICES IN EYRE 300 (Doris M. Stenton ed., Selden Society 53, 1934). A generation later (1248), a clerical plaintiff appeared to be satisfied by simply being "shown" a charter. This acceptance arguably indicates the beginnings of a gradual shift towards a less aural, more writing oriented legal culture. MEMORY, *supra* note 2, at 215.

[99] Finnegan, *supra* note 56, at 61.

[100] ROSALIND THOMAS, LITERACY AND ORALITY IN ANCIENT GREECE 69 (1992). Significantly, the *mnemones* survived in name into the Hellenistic period, but by this point they had been reduced to judicial clerks.

[101] 1 FRANCES PALGRAVE, THE RISE AND PROGRESS OF THE ENGLISH COMMONWEALTH 145 (London, John Murray, 1832) (quoting John of Ibelin, THE ASSIZES OF JERUSALEM ch. 45 (1266)).

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even in translation:

> By the lord, before whom this relic is holy, I will be to N. faithful and true, and love all that he loves, and shun all that he shuns, according to God's law, and according to the world's principles, and never, by will nor by force, by word nor by work, do aught of what is loathful to him.[102]

The same aural patterns appear in this Anglo-Saxon witness' oath: "In the name of Almighty God, as I here for N. in true witness stand, unbidden and unbought, so I with my eyes over-saw, and with my ears overheard, that which I with him say."[103] In ancient Ireland, legal expression could even assume an overtly poetic form, as evidenced by this heavily alliterative seventh century composition:

| | |
|---|---|
| Ma be ri rofessor | If thou be a king thou shouldst know |
| recht flatho | the prerogative of a ruler, |
| fothuth iar miad, | refection according to rank, |
| mesbada slog | contentions of hostings, |
| sabaid cuirmthige, | sticks (quarrels) in an ale-house |
| cuir mescae, | contracts made in drunkenness |
| mess tire, | valuation of lands, |
| tomus forrag, | measurement by poles; |
| forberta diri, | augmentations of a penalty, |
| dithle mesraid; | larceny of tree-fruit; |
| mormain mrugrechto: | the great substance of land-law: |
| mrogad coicrich, | marking out fresh boundaries, |
| cor culane, | planting of stakes, |
| corus rinde, | the law as to points [of stakes], |
| rann eter comorbu, | partition among co-heirs, |
| comaithig do garmaim, | summoning of neighbors, |
| gaill comlainn, | stone pillars of contest |
| caithigthi astado.... | fighters who fasten title....[104] |

[102] 1 ANCIENT LAWS AND INSTITUTES OF ENGLAND 179 (London, Commissioners of the Public Records, Benjamin Thorpe ed., 1840).

[103] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 43 (1973) (quoting ANCIENT LAWS AND INSTITUTES OF ENGLAND, *supra* note 102, at 181). For further discussion of the legal use of these techniques, see Dorothy Betherum, *Stylistic Features of Old English Laws*, 27 MODERN LANGUAGE REV. 263 (1932).

[104] D.A. Binchy, *An Archaic Legal Poem*, 9 CELTICA 152, 156-57 (1971). On versified laws in general, see THOMPSON, *supra* note 58, at 109.



Reflecting the communicative characteristics of its cultural environment, performative law occasionally finds aural expression in music and song as well as speech. Music, for instance, may mark the beginning or ending of a legal procedure. In Africa, extended drumming may announce a legal complaint or the opening and closing of indigenous courts.[105] Song may even play a part in litigation. Among the Mbala people of the Congo, opponents intersperse their speeches with snatches of allegorical singing in which their supporters join by voice and drum. This is an excerpt from one case:

> 1st Party (speaking): I was in my house and would have liked to stay. But he has come and wants to discuss the matter in public. So I have left my house and that is why you see me here.
> (singing): I am like a cricket. I would like to sing, but the wall of earth that surrounds me prevents me. Someone has forced me to come out of my hole, so I will sing.
> (speaking): Let us debate the things, slowly, otherwise we will have to go before the [writing-oriented] tribunal of the white people. You have forced me to come. When the sun has set, we shall still be here debating.
> (singing): I am like the dog that stays before the door until he gets a bone.
> 2nd Party (speaking): Nobody goes both ways at the same time. You have told this and that. One of the two must be wrong. That is why I am attacking you.
> (singing): A thief speaks with another thief. It is because you are bad that I attack you.[106]

Lest this practice be regarded as unduly alien and far-fetched, the reader might consider that in the thirteenth century—reflecting, perhaps, an even earlier tradition—English legal representatives were described by the French term, *conteurs*, the same word used to describe early medieval minstrels, or "singers of tales."[107] If not actually sung, legal pleadings of this period may still have been chanted in a formalized tonal variant of ordinary speech that would have emphasized their significance by associ-

[105] ROSE BRANDEL, THE MUSIC OF CENTRAL AFRICA: AN ETHNOMUSICOLOGICAL STUDY 39-40 (1961); *see also* T. OLAWALE ELIAS, THE NATURE OF AFRICAN CUSTOMARY LAW 220 (1956).

[106] BRANDEL, *supra* note 105, at 39-40 (quoting Leo A. Verwilghen, *in Album Notes to* FOLK MUSIC OF THE WESTERN CONGO (1952)).

[107] Michael T. Clanchy, *Remembering the Past and the Good Old Law*, 55 HIST. 165, 175 (1970).

ating them with the musical-poetic foundations of the cultural corpus.

In some performance cultures with simple law codes, music may also be employed to announce or teach the written law to a population that is generally illiterate. Not only can music make law pleasing to the ear, but it also can provide a melodic framework within which legal content may be readily recalled. Some evidence indicates that the laws of Charondas, the Greek Ionian lawgiver, were sung.[108] In this context, it may be no coincidence that the classical Greek word for statute law, *nomos*, could also mean "tune."[109] In his *Problems*, Aristotle actually speculated that the single term carried both meanings "because before men could write, they sang their laws to avoid forgetting them, as they still do among the Agathyrsi."[110] As late as the first century B.C., Cicero referred to the *Twelve Tables* that every school child memorized as a *carmen necessarium*, literally a "necessary song."[111]

Legal meaning in performance cultures may even reside in the miscellaneous sounds mentioned earlier.[112] For instance, sounds as well as speech can summon people to court. In early medieval London, the ringing of a bell served this purpose. If someone claimed not to have been summoned, it was said that "the beadle has no other witness, nor ought to have, than the great bell which is rung for the folkmoot at St. Paul's."[113] Members of performance cultures may alternatively or additionally use a sharp, loud, or piercing noise to announce legal transfers or transitions. In traditional Roman law, both the *mancipatio* conveyance ceremony and the *testamentum per aes et libram* (which was merely its testamentary variant) required that a set of scales be struck with a piece of bronze.[114] Early medieval contracts were often made by the buyer slapping the palm of the seller, an action that seems to have been calculated for aural as much as physical effect.[115] In central Africa, a death sentence may be pronounced by a stroke on the royal drum.[116] In another part of Africa, land transfers in the mid-twentieth century required the discharge of three gunshots over the property conveyed.[117] In this last instance, modern technology obviously provided the gun, but cultural aurality encouraged making the noise.[118]

[108] WILLIAM SEAGLE, THE HISTORY OF LAW 108 (1946). There is a similar story in Plutarch's *Lives*, to the effect that in the early sixth century. "Solon sang his laws to the people [of Athens] in verse (elegaic couplets) obviously because this was the way both to catch and to impress Greek ears." Robb, *supra* note 58, at 43 n.37. Some scholars have refused to accept that anything so serious as a set of laws could ever have been sung in ancient Greece, except perhaps as a parody. Others, however, have disagreed: "That [laws] should have been set to music and associated with festive occasions is fully in accord with the Greek sentiment, which saw in them not stern task-masters, but the companions of social life, friendly and intelligent advisers." SAMUEL H. BUTCHER, SOME ASPECTS OF THE GREEK GENIUS 174-75 (Kennikat Press 1969) (1891). For a controversial article on the singing of Greek laws, see Luigi Piccirilli, *'Nomoi' cantati e 'nomoi' scritti*, 2 CIVILITA CLASSICA E CRISTIANA 7 (1981).

[109] MICHAEL GAGARIN, EARLY GREEK LAW 54 n.10 (1986).

[110] ARISTOTLE, PROBLEMS 19.28 (Walter S. Hett trans., 1953).

[111] CICERO, DE LEGIBUS 2.59 (Clinton Keyes trans., 1943).

[112] *See supra* notes 65-69 and accompanying text.

[113] MEMORY, *supra* note 2, at 220 (quoting WILLIAM STUBBS, SELECT CHARTERS & OTHER ILLUSTRATIONS OF ENGLISH CONSTITUTIONAL HISTORY 313 (1900)).



## B. *Visual Communication and Legal Expression*

### 1. *The Cultural Significance of Sight*

Almost from the moment we are born into a writing culture, we are trained to be visually oriented.[119] Our education is almost entirely dedicated to teaching us how to understand and to communicate visually through reading and writing. In such an environment, our basic thoughts and values quickly come to be expressed in visual terms and metaphors. We have already encountered the ubiquitous modern expression "I see."

[114] JOLOWICZ, *supra* note 91, at 145; WATSON, *supra* note 77, at 77.

[115] JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 495 (1912). This practice still survives among cattle traders in France, England, and Denmark. *See* DAVID S. THOMSON, LANGUAGE 74-75 (1975). On the tactile aspects of hand-slapping, see *infra* notes 228-29 and accompanying text.

[116] BRANDEL, *supra* note 105, at 39.

[117] ROBERT LOWIE, PRIMITIVE SOCIETY 223 (1947).

[118] Residual instances of using sounds to communicate legal meaning in our own much less aurally-oriented society are the striking of a hammer on an auction block to mark a sale and the striking of a judge's gavel on the bench when a court is recessed or adjourned.

[119] For a discussion of the primacy of vision in present-day Western society, see Stephen A. Tyler, *The Vision Quest in the West, Or What the Mind's Eye Sees*, 40 J. OF ANTHROPOLOGICAL RES. 23 (1984). On the significance of visual perception in the writing cultures of fourth century B.C. Greece and the late Roman Empire respectively, see THORLIEF BOMAN, HEBREW THOUGHT COMPARED WITH GREEK 113-16 (1960); R.F. Newbold, *Centre, Periphery and Eye in the Late Roman Empire*, 3 FLORILEGIUM 72 (1981). For analogous discussions of the heightened importance of visual expression and experience in the later Middle Ages, see HUIZINGA, *supra* note 67, at 200-14, 269-73; MARGARET MILES, IMAGE AS INSIGHT: VISUAL UNDERSTANDING IN WESTERN CHRISTIANITY AND SECULAR CULTURE 64-75 (1985); Jeffrey Hamburger, *The Visual and the Visionary: The Image in Late Medieval Monastic Devotions*, 20 VIATOR 161 (1989); Heather Phillips, John Wyclif's *De Eucharistia* in Its Medieval Setting 123-202 (1980) (unpublished Ph.D. dissertation, University of Toronto).

To this might be added "seeing is believing," "I know it when I see it," and "what you see is what you get."[120] Our opinion frequently is our "point of view." We conceive of knowledge as "enlightenment." We call intelligent people "bright" and deride the not-so-bright as "dimwits."[121]

In preliterate or marginally literate societies, this obsession with the visual dimension of experience is absent. In the African Hausa language, for instance, the verb "to see" (*gani*) is virtually never used to communicate understanding.[122] In a cultural environment that is not dependent upon reading and writing, the sensory focus is elsewhere. As the Hausa proverb says, "seeing is not eating."[123] Some performance cultures are even suspicious of vision. In Suya Indian society, the eye is "the locus of the dangerous and anti-social,"[124] and persons of extraordinary vision are feared as witches.[125] Perhaps it is because of this somewhat negative attitude to seeing that so many wise or knowing men are depicted in performative myth and tradition as being or becoming blind.[126] In early Greek culture, Homer, Oedipus, and the prophet Tireseus were all reputed either to have been blind from birth or to have lost their sight at a moment of personal truth.[127] In Norse mythology, Odin likewise gave up his left eye in exchange for wisdom.[128]

Performative visual expression differs from visual expression in writing

[120] *See generally* Alan Dundes, *Seeing is Believing*, 81 NAT. HIST. 8 (1978).

[121] For a more extended consideration of modern visual metaphors for knowledge and thinking, see Walter J. Ong, *"I See What You Say": Sense Analogues for Intellect, in* INTERFACES OF THE WORD: STUDIES IN THE EVOLUTION OF CONSCIOUSNESS AND CULTURE 121-44 (1977).

[122] Ian Ritchie, *The Fusion of the Faculties: A Study of the Language of the Senses in Hausaland, in* VARIETIES, *supra* note 17, at 196.

[123] *Id.* (quoting C.E. WHITTING, HAUSA AND FULANI PROVERBS 52 (1940)). *Genesis* 1:3 may reflect an analogous sensory subordination of seeing in its story that the word was prior to the light in the order of creation. *See supra* note 52 and accompanying text.

[124] Seeger, *supra* note 43, at 215.

[125] *Id.* at 216; *see also* THE EVIL EYE: A FOLKLORE CASEBOOK (Alan Dundes ed., 1981). It may be significant that in the last two hundred years, as writing has become universalized in Western society, evil has increasingly become identified not with those who see, but with those who cannot see—a trend that arguably represents the moral dimension of sight's primacy in our own sensory hierarchy. On the recent association of blindness and evil, see MICHAEL E. MONBECK, THE MEANING OF BLINDNESS: ATTITUDES TOWARDS BLINDNESS AND BLIND PEOPLE 56-58 (1973).

[126] Seeger, *supra* note 43, at 222.

[127] On the correlation between blindness and wisdom in Greek culture, see William Super, *Sight and Seeing in Ancient Times*, 70 POPULAR SCI. MONTHLY 413, 423 (1907).

[128] H.R. DAVIDSON, GODS AND MYTHS OF NORTHERN EUROPE 26 (1964). My thanks to Spencer Clough for drawing this story to my attention.



cultures not only in having less stature, but also in having different form. First, most performative visual expression is nontextual. Little if any information is communicated through the visual depiction of words. Second, visual information in performance cultures tends to be three-dimensional and kinetic rather than two-dimensional and static; the use of writing has not yet accustomed performative individuals to expressing themselves on immobile, flat surfaces.[129]

The most common type of three-dimensional kinetic visual expression in any performance culture is gesture—expressive movements of the whole body, the head, the limbs, or the hand. Gestures may be both natural (instinctive) and conventional (cultural). In both forms, they can communicate many emotions and experiences. Stretching out the arms may express welcome; kneeling may express submission; offering or giving a gift may express friendship. Linking a number of gestures in series creates ceremony. Accelerating their rate of execution creates dance.

[129] The dominance of kinetic over static visual expression in performance cultures means that members of such cultures tend to place less emphasis on elements of visual communication that are more effective in a predominantly static visual environment. Color is the most obvious of these. In kinetic visual communication, color tends to be secondary to the communication of visual action. Only when something is immobile can its coloring be fully appreciated; when something is still, color may indeed be necessary to communicate what action cannot. Members of performance cultures are certainly capable of seeing as many colors as we are, and they are not averse to using colors in costume and art. Their color schemes nonetheless tend to be less elaborate than our own, and their languages contain only a few "color" words. For example, Homeric Greek contained no words for "color" at all. Different colors were understood by reference to light intensity (which arguably stands out more in a moving object). Green or yellow was denoted by *choros*, meaning "pale." Red or purple was denoted by *phoinix*, meaning "bright." Navy blue or iron grey was denoted by *huakinthos*, meaning "dark." Early Hebrew culture also was uninterested in color. On the few occasions when the Old Testament mentions rainbows, it notes them more for their brilliance and splendor than for their shadings. Light is consistently more important than hue. Anglo-Saxon society shared the same attitude. *Beowulf* has notably been described as "a poem of bright day and darkest night, light ale-hall and gloomy wasteland." In a similar vein, the scribes and decorators of early medieval manuscripts were as much, if not more, interested in making their works shine by the copious use of reflective gold and silver leaf as they were in using flat colors. They were literally "illuminators," not just "illustrators." Members of many traditional African societies still seem more concerned with brightness or darkness than "color" per se. The Shona language, for instance, contains only three specific color words. *See* BERNHARD BISCHOFF, LATIN PALEOGRAPHY: ANTIQUITY AND THE MIDDLE AGES 16-18 (1990); BOMAN, *supra* note 119, at 88; 3 WILLIAM E. GLADSTONE, STUDIES ON HOMER 456-96 (Oxford, Oxford University Press, 1858); GEOFFREY GORER, AFRICA DANCES: A BOOK ABOUT WEST AFRICA NEGROES 299 (1935); ELEANOR IRWIN, COLOUR TERMS IN GREEK POETRY (1974); OTTO LOWENSTEIN, THE SENSES 80 (1966); Nigel F. Barley, *Old English Colour Classification: Where do Matters Stand?*, 3 ANGLO-SAXON ENG. 15, 15 (1974); Ian Ritchie, *Hausa Sensory Symbolism*, 32 ANTHROPOLOGICA 113, 114 (1990).

Obviously, gestures are not alien to writing cultures. Members of writing cultures are nonetheless likely to demean them as not being carriers of serious information, and individuals in such societies may even constrain their use in conversation. In this context, it is clear that the predominant "visualism" of writing cultures, as a byproduct of writing, does not favor all visual media equally. The sixteenth century Protestant assault on liturgical gesture is too well known to need recounting here.[130] In mid-eighteenth century England, Samuel Johnson's aversion to gesticulating in company was so strong that when one of his interlocutors (presumably someone less writing-oriented than the famous lexicographer) sought to "giv[e] additional force to what he uttered, by expressive movements of his hands, Johnson fairly seized them, and held them down."[131] By 1878, the anthropologist E.B. Tylor felt able to suggest (albeit in a somewhat jingoistic tone) that:

> We English are perhaps poorer in the gesture-language than any other people in the world. We use a form of words to denote what a gesture . . . would express. Perhaps it is because we read and write so much, and have come to think and talk as we should write, and so let fall those aids to speech which cannot be carried into the written language.[132]

In performance cultures, by contrast, gestures literally occupy center stage. Western scholars observing native poets in Niger and other areas of Africa have noted the frequent use of gestures in the recitation of traditional tales and songs.[133] Their photographs reveal that these gestures are

[130] *See supra* note 5 and accompanying text. Even before the sixteenth century, Europeans' discomfort with expansive types of liturgical gesture was reflected in a new physical attitude of prayer. While early medieval manuscripts show supplicants raising their arms, manuscripts from the more literate fourteenth and fifteenth centuries depict praying individuals in a spatially confined, "modern" pose with their hands clasped close to their bodies. Saenger, *supra* note 34, at 152.

[131] JAMES BOSWELL, THE LIFE OF JOHNSON 323 (Christopher Hibbert ed., 1979).

[132] EDWARD B. TYLOR, RESEARCHES INTO THE EARLY HISTORY OF MANKIND 44 (Paul Bohannan ed., University of Chicago Press 1964) (1878). The apparently greater tendency among members of Continental European societies (especially the French and the Italians) to use more and/or more expansive gestures in everyday communication may reflect the greater tenacity of nonwritten forms of expression in the writing cultures of predominantly Catholic countries. *See supra* note 22 and accompanying text.

[133] Geneviéve Calame-Griaule, *Le Gestuelle des Conteurs: Etat d'une Recherche*, *in* ORALITA: CULTURA, LETTERATURA, DISCORSO (Bruno Gentili ed., 1985).



hardly incidental or subtle visual asides:[134] African storytellers actually stand up, move around, and sometimes even mime their narratives.[135] Gestures play a similarly striking role in everyday conversation. Thus, a French anthropologist has noted that among the west African Bambara people,

> while a man talks, his hands react like antennae trying to direct the speech or to encircle it to put it where it is necessary . . . . They follow closely the intonations of the voice, the affirmation, the interrogation, and the exclamations. Defenses and desires pass through them, as if the verb becomes more efficacious when carried by the ends of the fingers.[136]

The prominence that gesture enjoys in African performance cultures is reminiscent of its historical role in several preliterate and marginally literate European societies. For instance, judging from the art and literature that has survived them, the preclassical Greeks were highly gestural. On one archaic Greek vase, a woman touches her head to express mourning; on another, an old man touches the chin of a warrior brandishing a sword and thereby pleads for his life.[137] In the *Iliad*, Homer's heroes routinely communicate their elite status to onlookers by taking long strides into battle. Thus, Ajax at one point rushes forward "with a smile on his grim face, and with his feet below he went with long strides, brandishing his far-shadowing lance." On another occasion, "the Trojans pressed forward together and Hector led them on with long strides."[138] In the same poem, the great god Zeus gives his assent to a supplicant's request not by words, but by the more powerful gesture of bowing his head: "For this among the immortal gods is the mightiest witness I can give, and nothing I do shall be vain nor revocable nor a thing unfulfilled when I bend my head

[134] *See, e.g.*, Scheub, *supra* note 16, at 355-60; Calame-Griaule, *supra* note 133, at 304-05 (photographs).

[135] JAN VANSINA, ORAL TRADITION AS HISTORY 34 (1985).

[136] SUZANNE P. BLIER, GESTURES IN AFRICAN ART 22 (1982) (quoting Dominique Zahan).

[137] JEFFREY HURWIT, THE ART AND CULTURE OF EARLY GREECE, 1100-480 B.C. 25-26 (1985). For a literary instance of the pleading gesture (suggesting that this was not simply artistic convention), see THE ILIAD OF HOMER 1.500-.501 (Richmond A. Lattimore trans., 1951) [hereinafter THE ILIAD].

[138] Jan Bremer, *Walking, Standing and Sitting in Ancient Greek Culture*, *in* A CULTURAL HISTORY OF GESTURE, *supra* note 5, at 17 (quoting THE ILIAD, *supra* note 137, at 7.211-.214, 15.306-.307).

in assent to it."[139]

Medieval civilization was similarly accustomed to gestural communication. As historian Jacques Le Goff has so eloquently and persuasively noted,

> Gestures had meaning and committed people . . . . Signs of the cross were gestures of faith; joined hands, raised hands, hands outstretched in a cross, veiled hands were gestures of prayer. Beating one's breast was a gesture of penitence. The laying on of hands and signs of the cross were gestures of benediction. Censing was a gesture of exorcism. The ministration of sacraments culminated in a few gestures. The celebration of mass was a series of gestures. The pre-eminent literary genre of feudal society was the *chanson de geste* . . . .[140]

Again, contemporary gestural practices were reflected in art. One of the most common subjects in medieval painting and illumination is the figure of Christ raising his hand, keeping the index and middle fingers straight and the ring and little fingers bent in a very precise sign of benediction.[141] Other figures use their hands or arms to beckon, admonish, express resignation, or proclaim victory.[142] Ultimately, such gestures "gave [medieval art] life, made it expressive, and gave it a sense of line and movement."[143]

### 2. *The Sight of Law*

In keeping with its overall communicative environment, performative law has significant visual aspects, even if its visualism is not as all-embracing as that of law in our own writing culture. Performative law further reflects its cultural norms in preferring kinetic over static visual forms. In the absence or social insignificance of writing, its visual messages are primarily passed in gesture and ceremony. As the great English legal historian Frederic Maitland once commented, "So long as law is unwritten, it must be dramatized and acted. Justice must assume a pic-

[139] THE ILIAD, *supra* note 137, at 1.525-.527.

[140] JACQUES LE GOFF, MEDIEVAL CIVILIZATION: 400-1500, at 357 (Julia Barrow trans., 1988).

[141] MOSHE BARASCH, GIOTTO AND THE LANGUAGE OF GESTURE 19 (1987).

[142] *Id. passim.*

[143] LE GOFF, *supra* note 140, at 357.



turesque garb or she will not be seen."[144] In our modern writing culture we have almost entirely "lost sight" of this kind of visual legal expression. One historian of gesture recently admitted, "We would scarcely imagine today that a simple gesture could possess legal power or could commit people more efficiently than a written form drawn up by a notary and signed by both parties."[145] We therefore need to be reminded of the legal role visual signs had (and have) in performance cultures, and how those signs appear to observers.

[144] HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 58 (1983) (quoting Frederic Maitland).

[145] Jean-Claude Schmitt, *The Rationale of Gestures in the West: Third to Thirteenth Centuries*, *in* A CULTURAL HISTORY OF GESTURE, *supra* note 5, at 59. This attitude has unfortunately encouraged scholars and publishers to exclude manuscript depictions of legal gestures from their modern print redactions of such early medieval works as Beaumanoir, *Coutumes du Beauvaisis;* Bracton, *On the Laws and Customs of England;* Gratian, *Decretum*. Our understanding of the place of gesture in early medieval law (and, perhaps, in performative law in general) would arguably be very different if the "primary sources" on which we rely did not whitewash the visual record in this fashion. A book that attempts to compensate for this unfortunate practice is ANTHONY MELNIKAS, THE CORPUS OF THE MINIATURES IN THE MANUSCRIPTS OF DECRETUM GRATIANII (1975).

FIGURE 2. Homage. The vassal pays homage to his feudal lord by kneeling before him and raising his clasped hands so that the lord can close his own hands over them in a visual (and tactile) signal of authority and association. This ceremony was already hundreds of years old when it was depicted in this drawing from the Dresden Manuscript of the thirteenth century *Sachsenspiegal*.

In many performance cultures, visual signs communicate the creation of legal relationships. In ancient Mesopotamian law, for instance, a dying man wishing to designate an heir or legatee took that person by the hand.[146] Among the Dusun people of contemporary Borneo, a deathbed donor of property awards his legacy in a similar visual fashion.[147] In early medieval Europe, a vassal's placing of his folded hands within the hands of his lord was a visual sign of his submission to feudal authority (see Figure 2).[148] A medieval marriage routinely involved a joining of right hands. In thirteenth century France, a priest joined the hands of the bride and groom (see Figure 3).[149] In northern England and Scotland, the traditional "handfast" was between the groom and the father of the bride (for a depiction of an analogous legal gesture from early medieval Spain also implicating a transfer of land, see Figure 4).[150]

[146] A. Leo Oppenheim, Ancient Mesopotamia: Portrait of a Dead Civilization 283 (1964).

[147] Thomas R. Williams, *Cultural Stucturing of Tactile Experience in a Borneo Society*, 68 Am. Anthropologist 27, 34 (1968).

[148] François L. Ganshof, Feudalism 67 (1961).

[149] A History of Private Life II: Revelations of the Medieval World 130 (George Duby ed. & Arthur Goldhammer trans., 1988).

[150] Betty J. Bauml & Franz Bauml, A Dictionary of Gestures 122 (1975).



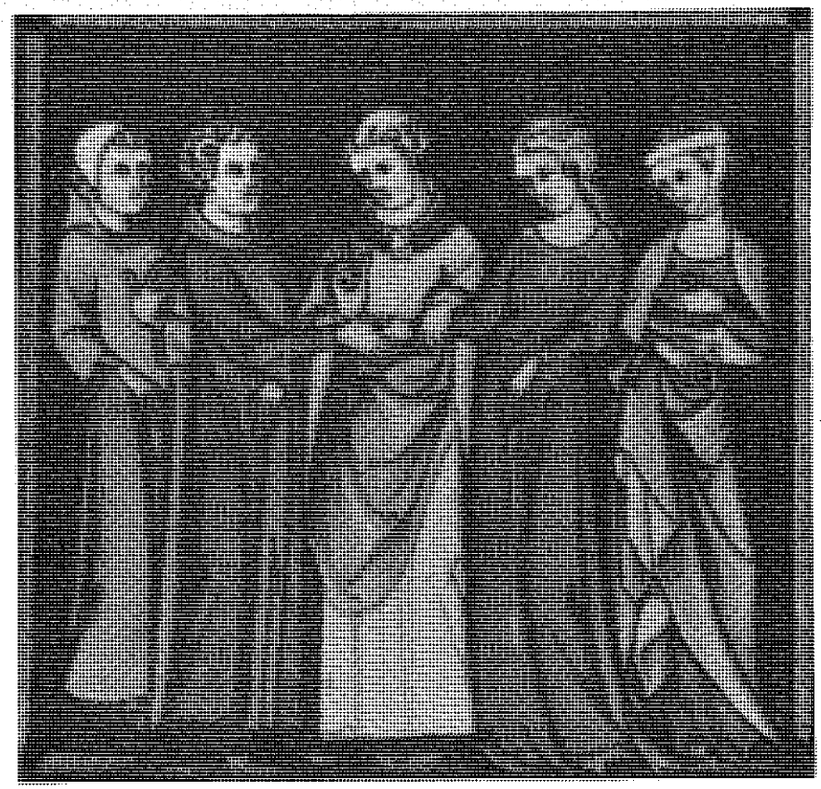

FIGURE 3. Marriage. In this miniature from a medieval French manuscript of the *Decretum*, a priest joins the hands of bride and groom as he blesses their union.

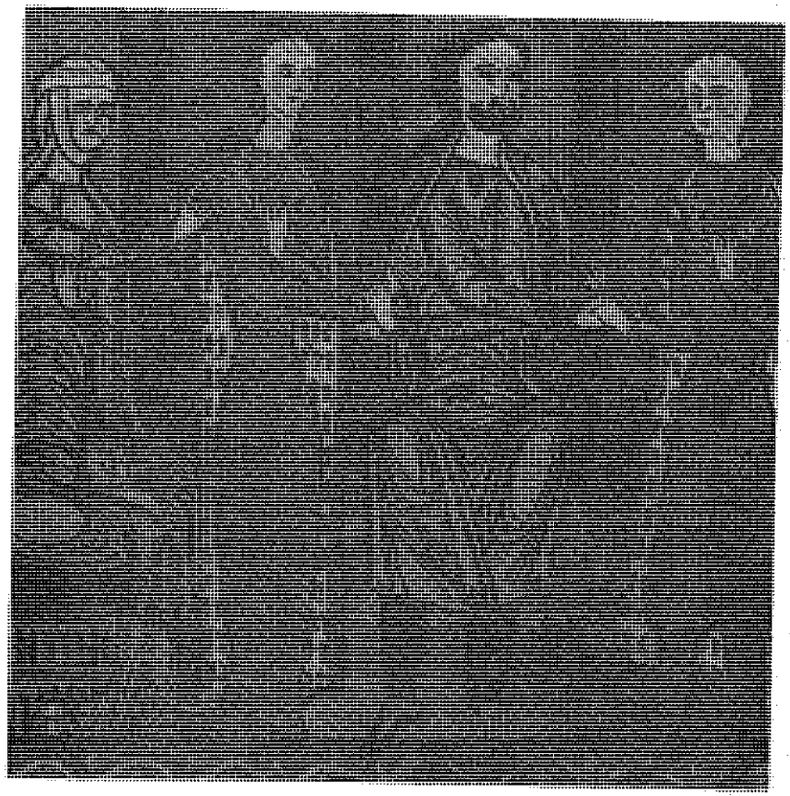

FIGURE 4. Marriage and Transmission of Feudal Rights. In this illustration from a thirteenth century Catalan mansucript known as the *Liber Feudorum Maior*, a father conveys ownership of land to his daughter and son-in-law on the occasion of their marriage.

Many legal relationships are premised upon agreement; it is therefore not surprising that gestures signaling agreement should resemble those signaling relationship. In early medieval Welsh, English, French, and Spanish law, a handclasp indicated the making of a contract.[151] Alterna-

[151] On the handclasp in early English medieval law, see 2 BOROUGH CUSTOMS 1xxx (Mary Bateson ed., Selden Society 21 (1906)). On Spanish and French practices, see David Ibbetson, *Sale of Goods in the Fourteenth Century*, 107 LAW Q. REV. 480, 483, 486 (1991). On the Welsh handclasp, see 2 THOMAS P. ELLIS, WELSH TRIBAL LAW AND CUSTOM IN THE MIDDLE AGES 4 (1926).



tively, early medieval Germans making an agreement could lay the palms of their hands together as they held them over their heads (presumably to maximize visibility).[152] Saxon practice permitted a raising of the hands, with two or four fingers extended, without actual touching.[153] In some African societies, buyer and seller communicate agreement by "waving their right hands up and down and then touching each other's palms with the fingers stretched away."[154]

Performative agreements and contracts may also be communicated by visible delivery or acceptance of some (frequently personal) item in a pledge of alliance, agreement, or performance. Of course, a material cipher is not necessary if the object of a transaction is handy and can be passed and received. If that object is not handy, or if the agreement does not require or involve transfer of goods, the use of a suitable symbol may be convenient to visually mark the transaction. A Mesopotamian debtor could seal a loan agreement by publicly delivering his garment (or, according to some sources, the hem of his garment) to his creditor.[155] In the early Middle Ages, straws, gloves, arrows, and staffs were popular for similar purposes of pledge.[156] In southern France and Italy, the gift of "God's penny"—a small coin—was a popular medieval mark of accord between buyer and seller.[157] In Ghanian society, it is still important to transfer some material token to "stamp" or "seal" a bargain visually.[158] In African Shona law, a prospective groom must offer the family of the prospective bride a "proposal token" (traditonally a hoe, bracelet, or anklet); acceptance of this token communicates the family's agreement to the proposal.[159]

Members of performance cultures may conversely communicate the dissolution or destruction of legal relationships and accords by visual means.

[152] RUDOLPH HUEBNER, A HISTORY OF GERMANIC PRIVATE LAW 495 (1918).

[153] *Id.*

[154] DOOB, *supra* note 64, at 70.

[155] Meir Malul, Studies in Legal Symbolic Acts in Mesopotamian Law 366 (1983) (unpublished Ph.D. dissertation, University of Pennsylvania).

[156] Henry C. Lodge, *The Anglo-Saxon Land Law*, *in* ESSAYS IN ANGLO-SAXON LAW 190 (Boston, Little, Brown and Co. 1876).

[157] Ibbetson, *supra* note 151, at 484.

[158] A.N. Allott, *Evidence in African Customary Law*, *in* 1 READINGS IN AFRICAN LAW 85 (Eugene Cotran & N.N. Rubin eds., 1970).

[159] *Id.* at 86.

The Mesopotamian son who wished legally to disown his parents abandoned his garment at the entrance of his former home. The Mesopotamian father who wished to disown his son broke a clod of earth between his fingers.[160] A Mesopotamian slave owner seeking to free a slave smashed the slave's ceramic pot (presumably by dropping it on the floor or dashing it against a wall).[161] Among the Salian Franks, an individual's legal abandonment of his family could be visually announced by breaking four staffs and throwing them to the four corners of his house.[162] The late twelfth century *chanson de geste* known as *Raoul de Cambrai* describes a breaking of feudal homage in similarly visual terms: an estranged vassal took "three hairs from the ermine he ha[d] on, pulling them through the links of his burnished hauberk, and hurled them at Raoul."[163] An early thirteenth century text depicts essentially the same procedure in a story that describes a young knight denying his homage to God "by throwing straw with his hand."[164] Contemporary manuscripts routinely depicted the dissolution of a marriage as a physical, visual separation of husband and wife by a judge or bishop (see Figure 5). In traditional South African black communities, a husband who wishes to divorce his wife presents her with a small coin or other object which visually indicates his wish to have nothing more to do with her.[165]

[160] Malul, *supra* note 155, at 110, 138.

[161] *Id.* at 58-59. The sounds accompanying these actions may not have been altogether incidental. *See supra* notes 112-18 and accompanying text.

[162] LE GOFF, *supra* note 30, at 268.

[163] RAOUL DE CAMBRAI vv. 2131-2135 (Sarah Kay ed. and trans., 1992).

[164] LE GOFF, *supra* note 30, at 247 (quoting Caesarius of Heisterbach, DIALOGUS MIRACULORUM (c. 1220)).

[165] J.F. HOLLEMAN, ISSUES IN AFRICAN LAW 9 (1974).

FIGURE 5. Annulment of Marriage. In this miniature from a thirteenth century copy of the *Decretum*, a bishop physically separates a man from his wife.

In performance cultures, visual gestures, acts, and ceremonies also publicize legal claims to property, especially land. In ancient Jewish law, for example, a land-claimant had to perform a visible ***hazakah*** act, generally considered to be "locking, fencing . . . [or] effecting . . . an opening [in the property]."[166] In early Icelandic law, a land-claimant had to spend a day on the land from sunrise to sunset, walking around and lighting fires on

[166] 1 ISSAC HERZOG, THE MAIN INSTITUTIONS OF JEWISH LAW 155 (1965).

the tract at prescribed distances.[167] In early medieval French law, the land-claimant had a variety of options. He could make a formal entrance onto the property on horseback or in a cart; he could make symbolic use of the land by cutting some turf and twigs from it; he could welcome guests to it; or he could sit down in a chair set upon it.[168] Early Irish law obliged a claimant to make three separate entries on disputed land: the first time with two horses and a witness; the second with four horses and two witnesses; and the third with eight horses and three witnesses. If no one objected to this high-visibility procedure, the claimant acquired ownership of the land. The claimant then had to demonstrate his right to the community at large by spending the night on the property, kindling a fire, and tending to animals.[169]

Property rights may also be visibly abandoned or terminated in performance cultures. An Anglo-Saxon landowner could legally quit his estate by jumping or climbing over a hedge.[170] A similar practice existed among the Salian Franks[171] and may even have existed in ancient Mesopotamian jurisprudence.[172] In medieval German law, the creditor of an insolvent debtor could signal the debtor's forthcoming eviction from his house or land by setting the debtor's stool or chair before the debtor's door.[173]

Performative gestures and visual actions can additionally communicate formal conveyances. In ancient Mesopotamian law, a vendor could transfer land to a purchaser by lifting his own foot off it and putting the purchaser's foot in his place.[174] This physically demonstrated the cessation of the old owner's control over the property and the commencement of control by a new owner. The Old Testament tells us that in ancient Israel, a land transfer could be similarly communicated by the vendor passing a sandal to the purchaser, metaphorically giving the latter the right to walk over (to possess) the property.[175] Early Greek, Roman, German, and English law recognized handing over a clod of earth as a sign of conveyance.[176] Subtle variants of this gesture involved certain items either taken from the land (sticks, grass, or straw) or representing power over the land (an arrow or glove, see Figure 6).[177] In one eleventh century French cartulary, gifts of land to a chapter house are recorded as having been made *per baculum* (a staff), *per clochear de turribulo* (a censer bell, which may additionally have been shaken and rung in the process of transfer), *per cultellum* (a knife), *per candalabrum* (a candlestick), *per denarium* (a penny), *per furcam* (a fork), and *per malleolum* (a hammer).[178] In the thirteenth century, Bracton recorded that in England, livery of seisin for a house "ought to be made by the door and its hasp and key."[179] In every one of these cases, it was contemplated that the object transfered would survive as a visual reminder of conveyance. Thus, an English chronicler writing *circa* 1100 noted that a cup given to Durham Cathedral on the occasion of a gift of land "is preserved in the church and retains the memory of that deed for ever."[180]

[167] A.J. GUREVICH, CATEGORIES OF MEDIEVAL CULTURE 236 (G.L. Campbell trans., 1984).

[168] BRISSAUD, *supra* note 115, at 373. On the German application of this last custom, see CRIMINAL JUSTICE THROUGH THE AGES, at 312 (John Fosberry trans., 1981) [hereinafter CRIMINAL JUSTICE]. The German verb *sitzen*, "to sit" is linguistically related to the term "seisin," which is so important in early English land law. *See 2* FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 30 (Cambridge, Cambridge University Press 1898). Visual acts of possession in Germanic law may also have included drawing water from the property, ploughing a short furrow through it, or taking a tile from the roof of any building on it. CARLO CALISSE, A HISTORY OF ITALIAN LAW 707 (1928).

[169] FERGUS KELLY, A GUIDE TO EARLY IRISH LAW 186-87 (1988). Compare this practice with the Icelandic claim-practice described earlier. *See supra* note 167 and accompanying text.

[170] POLLOCK & MAITLAND, *supra* note 168, at 85.

[171] HUEBNER, *supra* note 152, at 243.

[172] YOCHANAN MUFFS, STUDIES IN THE ARAMAIC LEGAL PAPYRI FROM ELEPHANTINE 101 (1973).

[173] CRIMINAL JUSTICE, *supra* note 168, at 312.

[174] MUFFS, *supra* note 172, at 21; *see also* Malul, *supra* note 155, at 514.

[175] *Ruth* 4:7. I am indebted to Rev. Dr. John B. Hibbitts for drawing this reference to my attention.

[176] On early Greek law, see LOUIS GERNET, THE ANTHROPOLOGY OF ANCIENT GREECE 166 (John Hamilton & Blaise Nagy trans., 1981). On early Roman law, see THE INSTITUTES OF GAIUS 4.17 (Francis de Zulueta trans., 1946) [hereinafter INSTITUTES]. Although Gaius wrote his *Institutes* in the second century A.D., he took a special delight in recording the details of many ancient legal practices that barely survived in his own time, if at all. On early German law, see MUNROE SMITH, THE DEVELOPMENT OF EUROPEAN LAW 59 (1928). On early English (Anglo-Saxon) law, see POLLOCK & MAITLAND, *supra* note 168, at 87.

[177] BRISSAUD, *supra* note 115, at 369-70.

[178] STEPHEN D. WHITE, CUSTOM, KINSHIP, AND GIFTS TO SAINTS: THE LAUDATIO PARENTUM IN WESTERN FRANCE, 1050-1150, at 249 n.101 (1988). The same record also notes transfers *per cartam* (charter), in which a writing appears physically to have taken the place of a more traditional object. Given this, it is noteworthy that at an early stage, instead of obviating the gestural ceremony of transfer, writing merely became part of it. *See* MEMORY, *supra* note 2, at 207-08.

[179] 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 125 (George E. Woodbine ed., Samuel E. Thorne trans., 1977).

[180] MEMORY, *supra* note 2, at 24 (quoting SIMEON OF DURHAM, SYMEONIS MONACHI OPERA OMNIA, *in* ROLL SERIES LXXV 97 (T. Arnold ed., n.p. 1882)).

FIGURE 6. Conveying Land. In this illustration from the Heidelberg Manuscript of the *Sachsenspiegel*, an erstwhile landholder conveys a fief (indicated by the grain to which he points) by handing a glove to his overlord. The fork around the landholder's neck symbolically indicates that this is an expropriation.

Besides communicating the fact of conveyance, visual gestures and acts may indicate to members of performance cultures the extent of property being conveyed. Boundaries can be pointed out to witnesses; larger properties may actually be perambulated. Both of these techniques appear to have been employed in early medieval European law, although there is some dispute as to their continued popularity once written charters regularly recorded elaborate land descriptions.[181] The record of one eleventh century Norman conveyance nonetheless refers to the conveyed property as "three gardens in front of the same Monville, as was shown from the public road to the brook."[182] Another charter indicates that the grantor of property "demonstrated the measurements and boundaries by showing [them] to Prior Geoffrey and Ernuceus the monk."[183] In Africa, conveyances may similarly include a visual demonstration of limits. Among the Kamba people, for instance, conveyancing involves pointing out boundaries, generally in the form of straight lines between such permanent or semi-permanent natural objects as large trees, stones, or ant hills.[184]



In performance cultures, visual communication of legal meaning is not, however, confined to simple transactions between individuals. Litigants and witnesses in performative disputes use visual cues, gestures, and movements to communicate their positions, their stories, their wishes, and their reactions. Few of these actions survive in the judicial routine of modern writing cultures (one exception is our habit of raising the right hand to take an oath). Instead, our primary memory of the visual aspect of performative procedure is metaphorical: in proposing something to a court, a litigant or lawyer still "makes a motion."

In performance-based legal systems, motions are visually concrete. In early Roman law, each party making a claim to an item of personal property would place a hand (or a staff) on it, in turn, to indicate his position. The judge would then intervene and decide the matter (*legis actio per sacramentum in rem*).[185] If the dispute were over land, the parties had to bring a clod of earth into court in order to make their claims.[186] In early medieval German law (if we believe the fourteenth century illuminators of the early thirteenth century German legal manuscript called the *Sachsen-*

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[181] *See* EMILY Z. TABUTEAU, TRANSFERS OF PROPERTY IN ELEVENTH CENTURY NORMAN LAW 132 (1988). For an explanation of how the growth of complex written charters made physically pointing out boundaries superfluous, see Samuel E. Thorne, *Livery of Seisin*, 52 LAW Q. REV. 345, 348-50 (1936).

[182] TABUTEAU, *supra* note 181, at 131 (quoting a charter from La Trinité du Mont, dated to between 1030 and 1035).

[183] *Id.* at 132 (quoting a charter from the *Livre blanc* of Saint Martin de Sees, folio 55v-56r, dated to 1099) (alteration in TABUTEAU).

[184] H.E. Lambert, *Land Tenure Among the Kamba*, 6 AFR. STUD. 157, 171 (1947).

[185] SEAGLE, *supra* note 108, at 94.

[186] Geoffrey MacCormack, *Formalism, Symbolism and Magic in Early Roman Law*, 37 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 439, 448 (1969).

*spiegel*, or "Mirror of the Saxons"),[187] a witness could indicate his support of a party by grasping that party's arm or shoulder. By crossing his hands, a witness indicated a refusal (or an incapacity) to give evidence or swear (see Figure 7). In thirteenth century England, a litigant could avow the right of another person to plead for him by raising his hand and that of his "attorney" together. A variant of this gesture involved the designated pleader holding up his hand in the other party's direction as if to swear. His client would then place his hand on the pleader's hand.[188]

[187] There has been a good deal of debate about whether the *Sachsenspiegel* illuminations depict legal gestures that were in actual use, or whether the illuminations were merely designed to visually represent transactions that relied on other media. This question, which of course can be extended to include the illuminations and miniatures in most medieval legal manuscripts, is as yet unresolved. Considering what we know generally about the medieval affiliation for gesture, I am nonetheless inclined to believe that the illuminators of the *Sachsenspiegel* and the other manuscripts correctly captured the importance of gesture in medieval legal communication, although occasionally they may have contrived, distorted, or exaggerated specific gestures or actions for visual effect. As Moshe Barasch has noted,

> the depiction of legal gesture—whether or not [the illuminators] were faithful to actual reality—attests to a full awareness of gesture as a symbolic form. Whether or not the judge in court, when performing a divorce, actually pushed husband and wife apart, . . . the public in the thirteenth century obviously believed that this was what happened in court, and that this gesture was part and parcel of the legal procedure itself. . . . Did everybody who declared in court his refusal to do something actually grasp his right hand with his left, immobilizing the hand that does the job, and thus manifesting his inability to act? A modern reader may doubt it. Yet, obviously this is how such actions were imagined in the Middle Ages.

BARASCH, *supra* note 141, at 6-7. Given the highly public (even open-air) nature of many legal proceedings in the early Middle Ages, it stands to reason that the manner in which legal procedures were imagined at that time basically reflected what they looked like. On the *Sachsenspiegel* illuminations, see KARL VON AMIRA, DIE DRESDENER BILDERHANDSCHRIFT DES SACHSENSPIEGELS (1902); Gerald H. Shinn, *The Eschatological Function of the Iconography in the Dresden Manuscript of the* Sachsenspiegel, *in* CONTEMPORARY REFLECTIONS ON THE MEDIEVAL CHRISTIAN TRADITION 53 (George H. Shriver ed., 1974); Malcolm Letts, *The* Sachsenspiegel *and its Illustrators*, 49 LEGAL Q. REV. 555 (1933). For a further discussion of the evidentiary value of the illustrations in medieval legal manuscripts as a whole, see Gernot Kocher, *Sachsenspiegal, Institutionen, Digesten, Codex-Zum Aussagewert mittelalterlicher Rechtsillustrationen*, 3 FORSCHUNGEN ZUR RECHTSARCHAOLOGIE UND RECHTSLICHEN VOLKSKUNDE 5 (1981).

[188] ROBERT C. PALMER, THE COUNTY COURTS OF MEDIEVAL ENGLAND: 1150-1350, at 92 (1982).



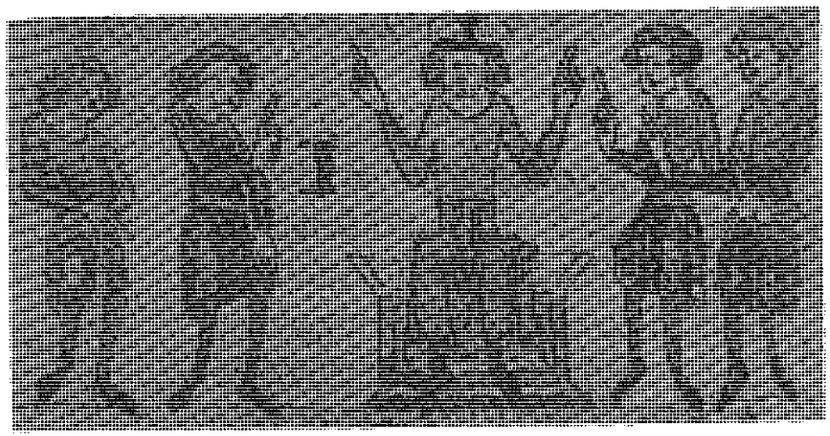

FIGURE 7. Refusing to Act. In this drawing from the Dresden Manuscript of the *Sachsenspiegel*, litigants or witnesses signal their refusal to act (perhaps their refusal to swear) by crossing their hands.

Where there are no witnesses to an act, or where an accused person is not deemed worthy to swear an oath, some performance cultures may demand that the accused perform some dangerous, visible gesture to communicate guilt or innocence. In early medieval Europe, for example, accused persons were often asked to carry a hot iron several paces. Providing the iron was not dropped, a finding of guilt depended on whether the burn festered. Alternatively, an accused might be ordered to retrieve a stone from a cauldron of hot water; again, any subsequent sign of infection was taken as a sign of guilt.[189] Similar feats are sometimes demanded of accused individuals in indigenous African societies.[190]

Unlike the other legal gestures considered in this section, the ordeal is not (at least in theory) a voluntary visual communication of meaning from one human person to another. Rather, the ordeal provides a sign of the

[189] On medieval ordeals generally, see ROBERT BARTLETT, TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL (1986). On medieval ordeals as a collection of "dramatic and memorable gestures," see Peter Brown, *Society and the Supernatural: A Medieval Change*, 104 DAEDALUS 133, 138 (1975).

[190] On African ordeals, see, e.g., BARRIE REYNOLDS, MAGIC, DIVINATION AND WITCHCRAFT AMONG THE BAROTSE OF NORTHERN RHODESIA (1963).

will of God (or of spirits) revealed to the community through the gestures of an individual whose actions are, for this purpose, divinely determined. Traditionally, most scholars have emphasized the "strangeness" or "irrationality" of this kind of divine adjudication; it is perhaps just as significant, however, that societies whose members communicate with gestures equally expect that God or other spiritual agents will use gestures (or their physical byproducts) to communicate with them. To this extent, the decline of the ordeal in later medieval Europe (and its retreat in contemporary Africa) may be partially explained not only by concerns about the rationality or theological propriety of asking God to intercede in human disputes, but also by the general decline in the social and intellectual status of gesture that accompanies a significant rise in cultural literacy.

### C. *Tactile Communication and Legal Expression*

#### 1. *The Cultural Significance of Touch*

Having considered the role of aural and visual media in performative communication and legal expression, we now move into the less familiar territory of tactile communication. The reader may understandably feel some unease at this juncture. Most members of modern writing cultures are even more suspicious of touch as a carrier of important information than they are of sound or gesture. We have largely struck touch from our cultural canon.[191] It is noteworthy that the original English form of the contemporary visual idiom "seeing is believing" seems to have been "seeing is believing, but feeling's the truth."[192] The new form suggests that sight has displaced touch as a preferred arbiter of knowledge.[193] From a slightly different perspective, a person considered "touchy" in our society is not as respected or admired as the "seer" or "visionary." Indeed, people do not like to have the touchy person around.[194]

Such attitudes are alien to most performance cultures. Their members live and think in a highly tactile universe. The Hellenic Greeks, for instance, considered geometry to be about "the way the various shapes felt

[191] *See generally* Frances W. Herring, *Touch—The Neglected Sense*, 7 J. AESTHETICS & ART CRITICISM 199 (1949).

[192] Dundes, *supra* note 120, at 11.

[193] *Id.*

[194] *Id.*



(they tended to imagine themselves fingering their way around a geometric figure), whereas modern geometricians think more about the way the various shapes look."[195] Touch likewise dominated the perceptions of early medieval Europeans.[196] In discussing the various human senses in his commentary on Aristotle's *De Anima*, St. Thomas Aquinas gave touch the most attention: it was the most fundamental sense, and functioned as a mirror of the mind. Aquinas believed that a light touch denoted intelligence and nobility of nature, while a heavy touch communicated the opposite qualities.[197] The concept of touching was so powerful that it served as a basis for other senses. Even seeing was understood as a form of touching, either of the eyes by rays emitted from objects ("intromission" theory), or of objects by rays sent forth from the eyes ("extramission" theory).[198]

The prevalence of touching as a legitimate medium of telling—and knowing—in performance-based societies has been frequently noted by outsiders from less tactile writing cultures. In 1913, for instance, the head of a Norwegian expedition to the Arctic reported that in his first contact with Eskimos, "Little children jumped up so as to be able to touch our shoulders and men and women stroked and handled us in a very friendly way."[199] Touching nonetheless transcends performative greeting rituals. Two North or West Africans may hold hands or otherwise continue physical contact throughout an encounter or conversation. As a general matter,

> Arms are continually reaching out to encircle children and to press them hard against an adult's body. . . . Men and women sit and walk with their arms round one another's shoulders. . . . [T]he continual attempt to make physical contact—to touch, to hold or to caress . . .—is one of the most noticeable elements in inter-personal relationships.[200]

In writing societies, such habits are likely to be regarded either as vulgar

[195] Walter J. Ong, *The Shifting Sensorium*, *in* VARIETIES, *supra* note 17, at 27.

[196] LE GOFF, *supra* note 140, at 339.

[197] On the attitudes of Thomas Aquinas, see Phillips, *supra* note 119, at 131.

[198] DAVID CHIDESTER, WORD AND LIGHT: SEEING, HEARING AND RELIGIOUS DISCOURSE 3-6 (1992).

[199] ASHLEY MONTAGU, TOUCHING: THE HUMAN SIGNIFICANCE OF THE SKIN 233 (1971).

[200] K.E. Read, *Morality and the Concept of the Person Among the Gahuku-Gama*, 25 OCEANIA 233, 268 (1955); *see also* Kit Griffin, *Notes on the Moroccan Sensorium*, 32 ANTHROPOLOGICA 107, 109-11 (1990).

or as breaches of etiquette. For instance, antitactile prejudices were at least partly responsible for a contemporary English dockworker's comment regarding male workers from far less literate Pakistan: "They're not natural . . . look at the way they hold hands."[201]

Even when members of performance cultures are not actually engaged in tactile contact, they frequently position themselves so as to facilitate tactile communication.[202] Conversations are typically held at close range, and individuals in groups tend to stand or sit very near each other. People literally wish to "stay in touch" (a modern idiom that may unwittingly recall an ancient cultural habit). As one anthropologist has written of the Wolof people of Senegal, "close physical proximity [is] . . . not only tolerated but sought out."[203] To sit or stand at a distance would make no more sense to a member of such a tactilely oriented society than for a member of a modern writing culture to stand or sit where eye contact is awkward. In this context, the pictures that have survived of huddled groups of early medieval people may not reflect "primitive" or poor living conditions—or even a certain artistic economy—as much as a natural tendency toward physical proximity among members of a performative society that still believed in the importance of tactile communication.[204]

Art-forms provide further evidence of the significance of tactile communication and expression in performance-based societies. There, sculpture and the other plastic arts take cultural priority over drawing and painting. Anthropologists have indeed discovered that many preliterate societies "lack any tradition of . . . two-dimensional representation."[205] Of course,

[201] MONTAGU, *supra* note 199, at 339 (quoting THE SPECTATOR, Sept. 5, 1970). One wonders what the dockworker would have said about his own twelfth century forebearers had he known that they too had a habit of holding hands, at least while walking. *See* BAUML & BAUML, *supra* note 150, at 140.

[202] On the general study of social distancing, or "proxemics," see EDWARD T. HALL, THE HIDDEN DIMENSION (1966).

[203] David Howes, *Sensorial Anthropology*, *in* VARIETIES, *supra* note 17, at 184 (quoting in translation JACQUELINE RABAIN, L'ENFANT DU LIGNAGE 79 (1979)).

[204] Phillips, *supra* note 119, at 132. On the significance of physical proximity in medieval Anglo-Saxon society in particular, see Redwine, *supra* note 40, at 71-75.

[205] MERLIN DONALD, ORIGINS OF THE MODERN MIND: THREE STAGES IN THE EVOLUTION OF CULTURE AND COGNITION 279 (1991); *see also* RUDOLF ARNHEIM, NEW ESSAYS ON THE PSYCHOLOGY OF ART 242 (1986); PAUL S. WINGERT, PRIMITIVE ART: ITS TRADITIONS AND STYLES 13 (1962). The performative priority of tactile over visual expression may even be seen in the two-dimensional works that are produced in performance cultures. These works are notoriously "flat," lacking any visual perspective that would communicate three-dimensional depth. In other words, their (two-dimensional) tactile surface dictates their (two-dimensional) visual form. In Hellenistic Greece and late medieval Europe, however, the use of optical perspective permitted two-dimensional surfaces to communicate three-dimensional "reality." Visual form overcame the limitations of its tactile surface, signaling the cultural triumph of visual over tactile perception.



three-dimensional sculptures and carvings can be handled as well as shaped[206] so as to provide tactile information lacking in "flat" two-dimensional art. Members of performance cultures actually do handle three-dimensional art objects: Australian aborigines, for instance, experience the carvings on wooden and stone *churingas* not merely by viewing them, but by touching them and even butting them against their stomachs.[207] Similarly, early medieval pilgrims touched religious statues and reliquaries, in many cases wearing them smooth with adoration. As one student of the early Middle Ages has noted, "the religion of the relic was a tactile religion."[208] Only in the later medieval period, as writing and literacy became more common and tactile communication less valued, did the practice of touching relics and statues decline.[209] Since then, Western statuary has become "painterly."[210] Informed by visual rather than tactile prejudices, it has become something to view rather than touch. This purpose is at once acknowledged and reinforced by the regulations of modern art galleries and museums.

### 2. *The Feel of Law*

Performance cultures whose members communicate important meanings through touch generally do not hesitate to enlist that medium in support of legal expression. To some extent, the tactile communication of legal meaning may be considered a byproduct of its visual communication. A legal signal or gesture seen by witnesses may sometimes be directly felt by the parties themselves. Given that members of performance cultures are relatively restrained in their enthusiasm for visual expression, however, it seems unlikely that they regard touching in this merely incidental fashion. Indeed, one suspects that as between seeing and touching, they

[206] Indeed, "the art [objects] of early African cultures, or of the Indians of North, South and Central America . . . seem to call out irresistibly to be handled." Herring, *supra* note 191, at 206 (quoting W.R. Valentine).

[207] Howes, *supra* note 44, at 63.

[208] Phillips, *supra* note 119, at 37.

[209] Stephen Wilson, *Introduction to* SAINTS AND THEIR CULTS: STUDIES IN RELIGIOUS SOCIOLOGY, FOLKLORE AND HISTORY 22 (Stephen Wilson ed., 1983).

[210] ROBERT GOLDWATER, PRIMITIVISM IN MODERN ART 35 (1986).

consider touching to be the primary carrier of legal meaning, at least for the parties touching or being touched, with the visible gesture being the byproduct of the transaction.

However characterized, the tactile communication of legal meaning in performance cultures tends to assume four basic forms. The first of these, gentle touching, can be either mutual or unilateral. In its mutual variety, gentle touching involves both parties making active, voluntary physical contact with one another, thereby communicating agreement or association. The several handclasps and handfasts described earlier[211] perfectly exemplify this type. The modern handshake may admittedly communicate similar ideas, but unlike its counterparts in performance cultures, it frequently operates as a mere ceremonial reflection of agreement legally made and communicated by other means (that is, by writing).

Unilateral gentle touching involves one party making unilateral physical contact either with an object or with a passive person. On many occasions, this communicates the making of a promise to the party represented by an object, or a promise made in relation to an object. In early Greek and Roman culture, for example, a legal promise could be made or an oath could be sworn by touching an altar or other object of religious significance.[212] Similar practices were common in the early Middle Ages. In Anglo-Saxon England, for example, Aethelred's Laws mandated that a witness swearing an oath hold relics in his hand.[213] In the late eleventh century, the Bayeux tapestry analogously depicted Harold Godwinson touching reliquaries, thereby swearing to support the claims of William of Normandy to the English throne (see Figure 8).[214] In a somewhat different context, witnesses of medieval land transactions could endorse a transfer they had heard and seen by touching the charter that sometimes recorded the transfer and their names.[215] This practice was reflected in the

[211] *See supra* notes 146 to 154 and accompanying text (discussing visual signs of performative vassalage, contract, pledge, and marriage).

[212] *See, e.g.*, BAUML & BAUML, *supra* note 150, at 152.

[213] David W. Rollason, Relic-Cults as an Instrument of Royal Policy, c. 900—c. 1050, 15 ANGLO-SAXON ENG. 91, 97 (1986).

[214] DAVID W. ROLLASON, SAINTS AND RELICS IN ANGLO-SAXON ENGLAND 191-92 (1989). Compare this practice with the modern, yet archaic, practice of swearing while having one's hand on the Bible.

[215] WHITE, *supra* note 178, at 32; *see also* CALISSE, *supra* note 168, at 706-07. The leading provision of the eighth-century Bavarian Laws thus demanded that witnesses of property transfers in favor of the Church "place their hands on the letter [*i.e.*, the charter]." LAWS OF THE ALAMANS AND BAVARIANS 118 (Theodore J. Rivers trans., 1977).

[216] Danet & Bogoch, *supra* note 78, at 103. The original Anglo-Saxon is usually (but inaccurately) translated as "the witnesses and their signatures are recorded."



common Anglo-Saxon formula "the witnesses are written and their hands touched."[216]

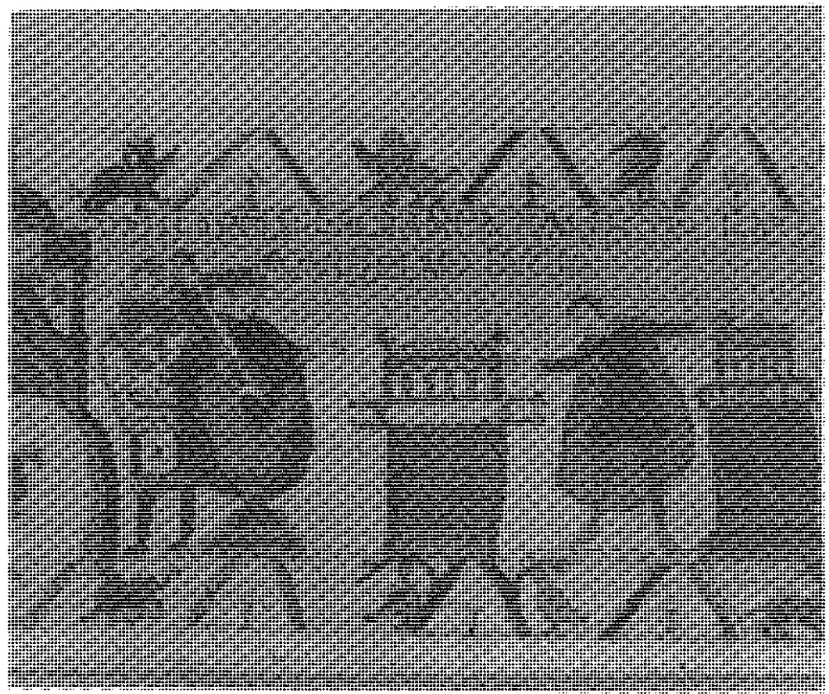

FIGURE 8. Swearing an Oath. In this frame from the Bayeux Tapestry, Harold Godwinson touches two reliquaries while promising to support William of Normandy's claim to the English throne.

Alternatively, unilateral gentle touching can communicate the assertion of legal authority over another person or thing. For instance, the early Roman procedure for claiming property, the *legis actio sacramentum*, en-

abled one person to claim another person as a slave by touching him with a ceremonial rod. The legal importance of this touching was reflected in the verbal declaration that accompanied it: "I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him."[217] The traditional Roman *mancipatio* ceremony also involved a claim-touch. Gaius tells us that "the taker by the mancipation must grasp the thing which is being mancipated to him, which is why the ceremony is called *mancipatio*, the thing being taken with the hand."[218] In early medieval German law, the procedure for reclaiming a serf who had renounced his lord in favor of another analogously required the first lord to touch and take hold of the serf's coattail (see Figure 9).[219]

FIGURE 9. Reclaiming a Serf. In this illustration from the Heidelberg Manuscript of the *Sachenspiegel*, a lord reclaims his serf by grasping his coat-tail while two other serfs swear in the lord's support.

[217] INSTITUTES, *supra* note 176, at 4.16.
[218] *Id.* at 1.121.
[219] CRIMINAL JUSTICE, *supra* note 168, at 77.



Finally, unilateral gentle touching in certain performance-based societies may indicate a legal claim against a person or signal his legal culpability pursuant to a claim. In Mesopotamian law, grasping a person's hem, under appropriate circumstances, constituted a formal complaint.[220] Under the Roman *Twelve Tables*, a judgment creditor claimed against a delinquent debtor by taking hold of "some part of the debtor's body."[221] In ancient Hebrew law, the individuals who testified against any man who was later condemned to stoning were required to "lay their hands upon his head" to indicate that he was guilty.[222]

The second broad type of tactile legal communication common in performance cultures involves forceful touching, a physically more powerful and potentially more painful form of contact generally designed to emphasize the seriousness of a claim, relationship, or transaction. Thus, one Mesopotamian could announce a legal accusation against another by hitting him on the forehead.[223] A Mesopotamian surety could legally guarantee a debt by striking or slapping the forehead of a debtor.[224] One interpretation of the earliest form of the Roman *stipulatio* procedure maintains that after going through the question-and-answer, the promisor bound the promisee by striking him with a ceremonial staff.[225] In eleventh and twelfth century Europe, a knight could legally confer knighthood on a squire by hitting him on the face or neck with the flat of his hand; this blow (the "colée") was later commuted to a gentler dubbing by the sword.[226] Perhaps it was familiarity with the use and mnemonic efficacy of this somewhat painful procedure that once prompted William of Normandy to joke that he should drive a symbolic knife through an abbot's hand instead of simply giving the knife to him as a token of conveyance: "That's the way to give land."[227] According to French feudal law, a purchaser of goods could analogously conclude a legal agreement with a vendor by striking the palm of the vendor's hand with his own.[228] The same

[220] Malul, *supra* note 155, at 560.
[221] INSTITUTES, *supra* note 176, at 4.21.
[222] *Leviticus* 24:14 (Revised Standard Version).
[223] Malul, *supra* note 155, at 581.
[224] *Id.* at 307.
[225] MacCormack, *supra* note 186, at 453-54.
[226] MARJORIE ROWLING, LIFE IN MEDIEVAL TIMES 39 (1979).
[227] POLLOCK & MAITLAND, *supra* note 168, at 87 (quoting in translation the *Cartulaire de l'abbaye de la Sainte Trinité du Mont de Rouen*).
[228] BRISSAUD, *supra* note 115, at 491.

practice was known in early medieval Germany, where it was termed *Handschlag*.[229] To this day, African Shona women may legally allege adultery or seduction by striking an offending man with an underapron.[230]

In a related vein, members of performance cultures may use forceful touching to communicate legal meaning and significance to witnesses of transactions or claims. Children attending important legal ceremonies in performance cultures may be struck to focus their attention on a certain time and place of legal consequence. In early medieval France, child witnesses had their ears boxed or tweaked.[231] Violence of this kind was occasionally recorded in contemporary writings. One eleventh century Norman charter notes the presence at a transaction of "William, infant, son of Fulk Moirus, who on account of the memory of this thing received a blow at the altar in the sight of many."[232] As the last phrase of this record suggests, such a striking would not only have had a tactile effect on the child, but also a profound visual impact on other witnesses.

The third basic method by which legal meanings may be tactilely conveyed in performance cultures is by kissing, a specific form of touching that appears to mark the creation or recognition of a particularly close and intimate bond. In the early Middle Ages, a kiss (*osculum*) signaled the establishment of a feudal relationship between lord and vassal. The kiss was so central a part of the process of paying homage that the procedure became known in some quarters as "a kissing."[233] The lord generally kissed the vassal full on the mouth, literally making him (in incidental reference to the hand gestures of fealty described earlier) a "man of

[229] George Sellett et al., *Archaic Methods of Validating a Contract—The "Blow" and the "Libation,"* 21 MICH. L. REV. 79, 83-84 (1922-23).

[230] Robert Seidman, *Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers' Reasonings and Customary Law*, 32 INT'L & COMP. L.Q. 871, 891 (1983).

[231] BRISSAUD, *supra* note 115, at 368-69 & n.5; *see also* MARC BLOCH, FEUDAL SOCIETY 114 (L.A. Manyon trans., 1961). On a similar custom in early Germanic law, see HUEBNER, *supra* note 152, at 242. On the medieval English practice of "beating the bounds" of a village, during which "small boys . . . had their buttocks bumped up against the trees and rocks which marked the bounds, so that they could remember them better," see GEORGE CASPAR HOMANS, ENGLISH VILLAGERS OF THE THIRTEENTH CENTURY 368 (1941).

[232] TABUTEAU, *supra* note 181, at 149 (quoting in translation a charter from Saint-Pierre de Preaux, dated to between 1078 and 1096).

[233] ERNEST CRAWLEY, STUDIES OF SAVAGES AND SEX 129 (Theodore Besterman ed., Books for Libraries Press 1969) (1929).



mouth and hands."[234] In eleventh century Normandy—outside the context of vassalage—an alienor might kiss a recipient of land to mark the transfer of property between them.[235] Kisses were similarly bestowed on new knights and people taking legal office.[236] Kissing could also communicate the resolution of a legal dispute.[237] In this context it may be that the ritual kiss of bride and groom at the end of the modern Western marriage ceremony originally had little or no romantic purpose, being but one application of a common technique of tactilely (and visually) communicating the creation, existence, or reanimation of a legal relationship. In the words of one scholar, "[It] recalls old laws and customs which considered it a formal promise of marriage, or even, in Roman law, a legal bond making the future bride a *quasi uxor*."[238] A somewhat more marginal use of kissing in the law of our own writing culture is the requirement that individuals swearing on the Bible "kiss the book."[239]

The fourth way in which members of performance cultures can express legal meanings in tactile form is by transfer, that is, the practice of one party handing something over to another as a token of conveyance, pledge, or performance. Transfer obviously has a visual dimension (one sees an object being passed), and in that sense it has already been considered, but its tactile aspect is also significant. After all, holding and letting go of objects are among the most fundamental of tactile experiences. The performative grantor—say, the early medieval European—who during a conveyance ceremony holds a clod of earth, tactilely communicates to himself his possession of land. Instead of merely declaring his possession in words, he literally feels the damp or dry soil in his hand. It is an unmistakeable tactile reminder of his association with it. When the conveyance is made and the clod is passed, the grantee of the land knows what he has acquired by feeling the dirt that has been given to him. Even when mem-

[234] LE GOFF, *supra* note 30, at 242-44, 252.

[235] TABUTEAU, *supra* note 181, at 121. For an early twelfth century instance of a property conveyance sealed with a kiss between the parties, see LE GOFF, *supra* note 30, at 238.

[236] CRAWLEY, *supra* note 233, at 121.

[237] *Id.* at 125; *see also* George von Rautenfeld, Nonverbal Communication in the "Nibelungenlied" Compared with that in the "Chanson de Roland" and the "Poema de Mio Cid" 104-05 (1980) (unpublished Ph.D. dissertation, University of Maryland) (suggesting that in early medieval Germany, it may have been the responsibility of the offender to initiate the kiss).

[238] Willem Frijhoff, *The Kiss Sacred and Profane: Reflections on a Cross-Cultural Confrontation*, *in* A CULTURAL HISTORY OF GESTURE, *supra* note 5, 223-24.

[239] BAUML & BAUML, *supra* note 150, at 215.

bers of performance cultures use more indirectly symbolic objects to signify conveyance or pledge, they are still engaged in tactile communication. The grantor or pledgor knows he is giving something up because he loses a tactile stimulus. He no longer feels anything in his hand. At the same time, the person receiving property or gaining the benefit of a pledge knows he has acquired something because he can feel an object he could not feel before.

In addition to these four forms of tactile legal expression used by or between individuals in most performance cultures, members of a number of performance-based societies believe that their guiding divinities or spirits can communicate the legal guilt or innocence of accused persons by touching them, or causing them to be touched, in certain ways. This type of tactile communication is facilitated and indeed called for in the ordeals I briefly described in considering "The Sight of Law." In an ordeal, the implicated divinity or spirit may not personally and directly touch the proband, but the proband is frequently commanded to touch or to otherwise come in contact with a substance that somehow represents or has been associated with the entity (through consecration, perhaps). If the proband can sustain the touch without injury—if he can carry the hot iron, or immerse his arms in the hot water—it signifies his innocence, and he is freed. If he cannot sustain the touch—if it is too painful for him, or too damaging to him—that signifies his guilt. The judgment is interpreted visually by witnesses, but the ceremony of the ordeal is calculated so that the accused man does not merely see, but also physically feels a divine sign of his guilt or innocence. His reaction to this touch of the gods seals his legal fate. Indeed, that touch may be the ultimate form of tactile legal communication.

### *D. Smell and Taste: Savory-Sense Communication and Legal Expression*

#### *1. The Cultural Significance of Savor*

The associated savory media of smell and taste play less obvious roles than sound, sight, and touch in the communication of significant meaning in performance cultures. Even so, their performative significance far exceeds the minimal relevance and role we commonly ascribe to them.[240] In

[240] On the minor impact of smell- and taste-based media in, for instance, modern art, see John Harris, *Oral and Olfactory Art*, 13 J. AESTHETIC EDUC. 5 (1979).



the first place, performance-based societies tend to be highly olfactory. The habit of reading and writing has not yet encouraged performative individuals to ignore, and even suppress, information received through their noses as opposed to their eyes.[241] Indeed, from the perspective of modern America, with its personal deodorants, air fresheners, and complex public sanitation systems,[242] it is almost impossible to appreciate how simultaneously rich and oppressive performative olfactory experience is. As pleasant and unpleasant odors envelop members of performance cultures at every turn—in the fields, in the home, and in the marketplace—it is only natural that such individuals should use smells and scents both to communicate and to understand.

In ancient Near Eastern culture, sweet smells of perfume, incense, and sacrificial smoke indicated both divine presence and divine approval; they were therefore common features in religious and political ritual.[243] The Hebrew prophet Isaiah foretold that God would communicate his displeasure with men by a changing odor: "instead of sweet smell, there shall be stink."[244] Homer's Greeks similarly believed that their gods signified anger by leaving burnt offerings "charred in acrid smoke."[245] The early medieval Church not only employed incense to communicate with God, but additionally regarded sweet smells as God's way of communicating the holiness of his ministers. This was the famous "odor of sanctity," which was invariably supposed to issue from the exhumed remains of any saint.[246]

[241] On the cultural and literary significance of smell and fragrance in European culture as late as the seventeenth century, see FEBVRE, *supra* note 8, at 423-32; MANDROU, *supra* note 8, at 56-57.

[242] On the anti-olifactory bias of the modern age, see Lance Strate, *Media and the Sense of Smell*, *in* INTER/MEDIA: INTERPERSONAL COMMUNICATION IN A MEDIA WORLD 428 (Gary Gumpert & Robert Cathcart eds., 3d ed. 1986) (1979). In light of this bias, it is significant that contemporary English contains many expressions associating odor with wrong. A suspicious arrangement "smells." A bad idea "stinks." A person who says one thing and does another "reeks of hypocrisy."

[243] On the significance of smell in performative religious practice, see ROY BEDICHEK, THE SENSE OF SMELL 227-33 (1960); ANNICK LE GUERER, SCENT: THE MYSTERIOUS AND ESSENTIAL POWERS OF SMELL 109-20 (Richard Miller trans., 1992); D. MICHAEL STODDART, THE SCENTED APE: THE BIOLOGY AND CULTURE OF HUMAN ODOUR (1990) (especially chapter 7). On the political uses of scent (especially in ancient Near Eastern palace architecture), see EDWIN T. MORRIS, FRAGRANCE: THE STORY OF PERFUME FROM CLEOPATRA TO CHANEL 57, 71 (1984).

[244] *Isaiah* 3:24 (King James Version).

[245] BEDICHEK, *supra* note 243, at 225 (quoting Homer).

[246] LE GUERER, *supra* note 243, at 120-27.

The acknowledged value of communication and comprehension through smell in performance cultures incidentally adds a further dimension to what I have identified as a cultural tendency towards physical closeness and proximity.[247] Like touch, smell is in most cases only employable and understandable at close physical range. Thus, members of traditional Arab cultures prefer to stand close to one another so that they may literally be in the other's breathing space, the smell of breath supposedly being very communicative of a person's character and disposition.[248] The fact that we are so literally and metaphorically protective of our "breathing space" indicates how far our writing culture has backed away from olfactory communication.

The sense of smell is inherently linked with the sense of taste. Without a sense of smell, taste is robbed of most of its meaning. Conversely, sensitivity to smell in most instances promises sensitivity to taste and, by implication, the habits of eating and drinking. In performance cultures, the general sharing of taste through food and drink routinely communicates friendship, approval, agreement, or transition. For instance, in the language of the Luba people of Zaire the verb "to eat" denotes new access to power. One "eats the office of chief" (becomes chief).[249] Members of performance cultures may consciously manipulate individual tastes to emphasize, or even to alter, the basic meanings of ingestion. African Songhay culture thus holds that respect can be communicated to visitors by the preparation of savory sauces; contempt or disapproval may be signaled by the preparation and serving of a "bad sauce."[250] In Hausa society, the cultural and communicative significance of tasting and eating is emphasized by the prominence of these activities in folktales, a majority of which "centre around food, tasting, eating or swallowing."[251] In one remarkable Hausa tale, all the actors in the story are foods and tastes: Salt, Pepper, Nari (a peanut-based sauce), Onion Leaves, and Daudawar Batso (a strong-smelling sauce).[252]

[247] *See supra* notes 202-04 and accompanying text.

[248] HALL, *supra* note 202, at 49; *see also* Michael Argyle, *The Syntaxes of Bodily Communication*, *in* THE BODY AS A MEDIUM OF EXPRESSION 145 (Jonathan Benthall & Ted Polhemus eds., 1975). The Warao people of Venezuela analogously believe that a sorcerer's bad breath is a sign of his recent return from the underworld. Constance Classen, *The Odor of the Other; Olfactory Symbolism and Cultural Categories*, 20 ETHOS 133, 153 (1992).

[249] FABIAN, *supra* note 31, at 24.

[250] STOLLER, *supra* note 17, at 18-19.

[251] Ritchie, *supra* note 122, at 114. This prominence recalls the fascination with feasting that is evident in both the Homeric and early medieval epics.



### 2. *The Savor of Law*

Just as the law of performance cultures has a sound, a look, and a feel, it has a savor. Failure to recognize this fact can cause members of writing cultures to overlook or misinterpret important forms of performative legal expression. For instance, members of writing cultures may not immediately appreciate that in a performance culture, the release of scent can communicate significant changes in an individual's legal condition, relationships, or obligations.[253] In ancient Mesopotamia, many such changes were marked by anointing individuals with the scented oil ubiquitous in Near Eastern cultures. We know that anointing played a part in the conveyance of land, although we do not know whether this anointing was of the parties by each other, of the parties by themselves, or of witnesses by the parties.[254] Anointing could also announce a Mesopotamian betrothal or, according to some scholars, a marriage.[255] It could similarly be used in freeing a slave, provided it was done in the early morning, with the slave facing the rising sun.[256] This orientation may itself have been aromatically significant. In the first place, the heat of the sun can enhance the scent of certain oils. In the second place, if the oil poured on the head were mixed with fat (as was sometimes done in the Near East), the heat of the sun would eventually cause the fat to melt, gradually releasing the scented unguents over the body:[257] the higher the sun rose in the sky, the easier perhaps it became for the former slave (and others) literally to sniff the scent of freedom.

Evidence for the use of scent in the legal transactions of performance cultures outside the Near East is far less common, but occasionally one finds a legal event that has either an overt or an incidental aromatic aspect. Here the point is not that olfactory communication of legal meanings

[252] *Id.* at 115.

[253] For a general discussion of the sociological link between change and the release of scent, see David Howes, *Olfaction and Transition: An Essay on the Ritual Uses of Smell*, 24 CANADIAN REV. SOC. & ANTHROPOLOGY 398 (1987).

[254] Malul, *supra* note 155, at 440.

[255] *Id.* at 204.

[256] *Id.* at 58.

[257] MORRIS, *supra* note 243, at 62.

is commonplace, but that it occurs at all. In early medieval Europe, for instance, the ultimate legal act of royal coronation reached its climax not when the king took his verbal oath or assumed the visual symbols of his office, but at the unction, when the officiating cleric poured aromatic oil over the king's shoulders and head, formally and mystically communicating his ascension to both him and the assembled throng.[258]

In performance cultures, tasting, eating, and drinking may similarly communicate a legal transaction or event to immediate parties or to witnesses. The meaning of these acts nonetheless varies from culture to culture. In the ancient Near East, taking a meal together could communicate the establishment of a binding agreement. A Hebrew tradition notably regards the Old Covenant with Yahweh as a meal taken together in his presence.[259] In *Exodus*, God moreover says to Moses that through the eating of unleavened bread at Passover, "it shall be to you as a sign on your hand and a memorial between your eyes, that the law of God may be in your mouth."[260] In the Middle Ages, a couple ate together to signal their marriage (which may be the source of the modern practice of watching the bride and groom as they eat the first slice of wedding cake).[261] Among the Anglo-Saxons, a ritual meal or feast could also communicate the revival of a relationship after a dispute.[262] A similar custom is still common in parts of Africa. Among the Ibo people, the party judged to be at fault is required to take food to the other party so that the two can eat together, thereby communicating their new-found peace to themselves and to observers.[263] It has also been asserted that the early medieval quitclaim originally involved a formal dinner representing the end of contention over land.[264]

On occasion, meals marking a legal transaction may be shared with witnesses. This practice serves both as an advance gesture of thanks to the

[258] H.G. Richardson, *The Coronation in Medieval England*, 16 TRADITIO 111, 116 (1960).
[259] ZACHARIAS P. THUNDYIL, COVENANT IN ANGLO-SAXON THOUGHT 12 (1972) (citing *Exodus* 24:11).
[260] *Exodus* 13:9 (Revised Standard Version).
[261] PETER FARB & GEORGE AMELEGOS, CONSUMING PASSIONS: THE ANTHROPOLOGY OF EATING 5 (1980).
[262] Warren Lehman, *The First English Law*, 6 J. LEGAL HIST. 1, 17 (1984).
[263] HOLLEMAN, *supra* note 165, at 11; ELIAS, *supra* note 105, at 269. On eating together as a mode of reconciliation in various Pacific Island cultures, see CRAWLEY, *supra* note 233, at 255.
[264] Fredric L. Cheyette, *The Invention of the State*, *in* ESSAYS ON MEDIEVAL CIVILIZATION 15 (Bede K. Lackner & Kenneth R. Philip eds., 1978).



witnesses for supporting the transaction afterwards and as a means of communicating the nature and importance of the legal event. In Mesopotamian law, for instance, parties and witnesses to a land transaction were required to "eat the ram and drink the cup"[265] before their dealings were legally complete and valid. In African Kamba society, food and drink are still provided to witnesses to a property transaction.[266] Similar practices are known to Ghanian Akan law and to the law of the Philippine Nabaloi people.[267]

Although drinking often accompanies eating on legal occasions, drinking may mark a transaction on its own. In Homeric Greece, for instance, contracting parties poured wine into a bowl and shared the contents to communicate the mixing of their wills and fates.[268] The mythic Argonauts marked their mutual compact by drinking a mixture of "barley, bull's blood, and seawater."[269] Herodotus reported that Greek mercenaries once indicated their agreement to serve by drinking a mixture of wine, water, and the blood of a human sacrifice.[270] Continuing an ancient Teutonic tradition, bargains in early medieval Germany and central Europe were also sealed by drinking together.[271] In traditional Zulu culture, drinking beer from the same vessel formally communicated reconciliation.[272] In native Fijian society, drinking from the same dish communicates the completion of a legal marriage.[273] This practice survives as an archaism in many writing cultures, with bride and groom drinking from the same wedding- or loving-cup. The modern habit of toasting someone or something may faintly echo these performative procedures.[274]

From time to time, drinking for legal purposes may be unilateral. In this situation, taste communicates legal meaning or change to only one

[265] Malul, *supra* note 155, at 440 (quoting a Mesopotamian formula).
[266] H.E. Lambert, *Land Tenure Among the Akamba*, 6 AFR. STUD. 157, 171 (1947).
[267] Allott, *supra* note 158, at 85.
[268] GERNET, *supra* note 176, at 168.
[269] *Id.*
[270] *Id.*
[271] BRISSAUD, *supra* note 115, at 494; THUNDYIL, *supra* note 259, at 68; Ibbetson, *supra* note 151, at 483.
[272] Edwin W. Smith, *African Symbolism*, 82 J. ROYAL ANTHROPOLOGICAL INST. GREAT BRITAIN & IR. 13, 29 (1952).
[273] H. CLAY TRUMBULL, THE BLOOD COVENANT 193 (New York, Charles Scribner's Sons 1885).
[274] *Id.* at 201.

party, although the consumption of the drink may provide a convenient visual sign for witnesses. The record of one Anglo-Saxon conveyance thus reads:

> [O]ne Ulphus, the son of Toraldus, turned aside into York, and filled the horn he was wont to drink out of with wine; and before the altar, upon his bended knee, drinking it, gave away to God and to St. Peter, the prince of the apostles, all his lands and revenues.[275]

It is reasonable to conclude that the cups and drinking horns that rested in so many medieval muniment rooms as physical records of land transfers either were used in a similar way or materially recalled an earlier tradition.[276]

In a performance culture, drinking to transfer property may also constitute an oath to make good the transfer. Both eating and drinking are directly associated with oath-taking in many performance-based societies. Frequently, the food and drink consumed are seen as divinely blessed or of divine origin, and are thus regarded as vehicles through which the gods or spirits can communicate legal meanings to the participants. This makes them particularly attractive tools in oath-based ordeals. In the early Middle Ages, clerics were subjected to "the ordeal of the sacred morsel." If a cleric were innocent and swore truly, God would enable him to swallow a morsel of consecrated bread or cheese; if the cleric were guilty and swore falsely, God would prevent him from swallowing.[277] Among the Mabulu people of Nigeria, a person may analogously swear to his ownership of land by swallowing a piece of earth and saying, "if this is not my earth, may I never eat the fruits thereof and live,"[278] under the belief that gods or spirits acting through the eaten earth will kill the oath-swearer if the claim is legally false.

If the gods can convey legal meaning to man through eating and drinking, it stands to reason that man can convey legally significant meanings to the gods by offering them food and drink. This is attempted in many

[275] 2 ARCHER POLSON, LAW AND LAWYERS, OR SKETCHES AND ILLUSTRATIONS OF LEGAL HISTORY AND BIBLIOGRAPHY 223 (London, Longman 1840).

[276] *See supra* note 180 and accompanying text.

[277] HENRY C. LEA, SUPERSTITION AND FORCE 263-73 (Haskell House 1971) (1870); Roger D. Groot, *Lie Detectors: Of Sacred Morsels and Polygraphs*, 10 LEGAL STUD. F. 203, 205 (1986).

[278] DOOB, *supra* note 64, at 304-05 (quoting a Mabulu formula reported in 1 C.K. MEEK, THE NORTHERN TRIBES OF NIGERIA 264-65 (1925)).



performance cultures by a variety of techniques. Libation, for instance, involves offering a liquid (generally blood or water) to a deity by pouring it over an object associated with the deity. Libations were legally significant in early Greek and Roman law where they generally denoted agreements or promises. In Rome, the act of libation was implicated in the words of the ancient *stipulatio* contract, the contractee's answer of "*spondeo*" coming from a Greek word meaning "drink-offering." This suggests that it may once have been customary to make such an offering before an agreement could be concluded.[279]

## III. THE PHENOMENON OF PERFORMANCE

> 'Tis all in pieces, all coherence gone,
> All just supply and all relation.
>
> John Donne[280]

In our own culture, we are accustomed to communicating and assimilating most of our important intellectual information through individual and isolated media. Our most powerful expressive form, the written word, has effectively monopolized its contexts. It has generally excluded "lesser" forms of aural, tactile, and savory communication from its sensory space. Writers communicate by manipulating words and letters, not sounds, touches, scents, or flavors. Under the impetus of print technology, writing has even displaced other kinds of visual expression with which it is more theoretically compatible. Thus, our serious treatises usually have either very few pictures (frequently segregated from the text in a collection of "plates") or no pictures at all.

Our culture's reliance on writing has also influenced the ways in which we experience nonwritten media. When engaged in serious cultural communication, we are inclined to isolate specific nonwritten forms of expression from each other, just as we routinely isolate our writing from those forms. We therefore separate music (aural) from painting (visual), and dance (visual) from sculpture (tactile).[281] We perceive each of these prod-

[279] GERNET, *supra* note 176, at 169; JOLOWICZ, *supra* note 91, at 294 n.3; Sellett et al., *supra* note 229, at 83.

[280] AN ANATOMY OF THE WORLD (facsimile of first edition, Cambridge 1951) (1611).

[281] On the separation of the arts in modern Western society, see Edmund R. Leach, *Aesthetics*, *in* THE INSTITUTIONS OF PRIMITIVE SOCIETY 27 (Edward E. Evans-Pritchard ed., 1956). For a

ucts as fundamentally different. Even on those rare occasions when we unite two or more sensory elements, we still try to separate creative responsibility for each of them. We divide the labor of creating a ballet between the composer (who deals in what is heard) and the choreographer (who deals in what is seen).[282] We may even take steps to ensure that information that is capable of being transmitted and appreciated through several senses simultaneously is only transmitted and appreciated through one. For instance, the rules of most art galleries not only forbid visitors from touching sculpture, but they also discourage talking, just as we discourage talking in a library. This coincidence underlines the constraining influence writing has had on our general behavior, even where writing itself is not involved.

Our law has hardly been immune from these efforts at sensory dissociation. For example, the parol evidence rule dictates that if parties make an agreement in writing, that writing, if unambiguous, becomes legally definitive. All prior or contemporaneous utterances of the parties become immaterial. Instead of being considered as parts of a single expressive event, "relevant" writing is separated from "irrelevant" speech. Within the ranks of the legal profession, we have similarly come to regard legal speaking and legal writing as separate tasks. The former is the special province of the litigator who spends his or her professional life going to court and arguing cases. In England, the distinction between legal speaking and legal writing has actually been institutionalized, with barristers doing oral advocacy while solicitors draft most of the legal documents. Even within the realm of visual communication, the law is almost entirely a matter of written words. When an American or English appellate court reviews a trial court decision, it reviews the written record of what was said without asking to see living witnesses or inquiring about their demeanor while testifying. By virtue of the same understanding, our law reports, statute books, and texts rarely include illustrations.

brief discussion of the particular impact of print on the process of sensory separation, see MCLUHAN, *supra* note 17, at 159.

[282] Having said this, it must be acknowledged that largely under the influence of modern audio-visual technology, avante-garde post-modernist artists are increasingly rejecting the standard separation of art forms in favor of a more integrated approach. In the context of this paper, it is significant that one of these new integrated art forms has actually been termed "performance art." *See* JESSICA PRINZ, ART DISCOURSE/DISCOURSE IN ART 1-42 (1992). My thanks to Marc Silverman for reminding me of this point.



In performance cultures, the basic communicative idiom is very different. Instead of suppressing certain media or keeping them separate, members of preliterate or marginally literate societies continually combine media. In their highest forms of cultural and intellectual expression, speech routinely gives voice to gesture and gesture gives shape to speech; music gives sound to sculpture, while sculpture gives substance to music. Law is simultaneously heard, seen, and sometimes even felt and savored. Ultimately, the meaning of significant cultural and legal messages resides less in the individual components of communication (although these must be recognized) than in their synthesis, performance.

In the first part of this section, I will review how different media work together in performance cultures to transmit lore and law. In the second part of this section, I will consider the circumstances contributing to the popularity of performance as a cultural and legal "meta-medium." In the third and final part of this section, I will discuss the distribution of information among the various sensory components of performance and ponder the pitfalls that distribution presents for our evaluation of cultural and legal meaning in performance-based societies.

### A. *Performing Lore and Law*

In performance cultures, performances characterize innumerable social and intellectual events that members of our writing culture would regard as implicating only a single medium, and frequently only a single aspect of that medium. For instance, we commonly characterize the recitation of poetry as a form of aural communication, relying on the speaking and hearing of words. In a performance culture, the recitation of poetry involves much more. In ancient Greece, for example, the poet's words were delivered as part of a larger aural-visual-tactile complex of music and dance.[283] In this context, it is no accident that the single word *mousiké*, which denoted "the art of the Muses," referred to words, music, and

[283] BRUNO GENTILI, POETRY AND ITS PUBLIC IN ANCIENT GREECE 24 (1988). Early in the fifth century B.C., the lyric poet Pindar acknowledged the sensory complexity of Greek poetic performance in these terms: "The garlands placed like a yoke upon the hair exact from me payment of this sacred debt: to blend together properly the lyre with her intricate voice, and the shout of oboes, and the placing of words." THOMAS, *supra* note 100, at 118 (quoting PINDAR, OLYMPIAN ODES 3.6-.9).

dance equally.[284] Anthropologists have noted similar sensory associations in traditional African societies. Here, the roles of words, music, gesture, and dance are so inextricably mixed that one anthropologist has suggested that "not just the tape recorder or bound volume which records the sound alone, but perhaps a full-length color film appears to be the one medium that can catch and convey something of the complete, complex and magnificent texture that is the [Ozidi] epic."[285] Words and music in particular are so interdependent that African performers have difficulty dictating the text of a poem without musical accompaniment.[286]

The same general points might be made about the exhibition of sculpture and carving. Largely because of the constraints we have imposed on aural and tactile expression, we tend to conceive of such exhibition as a visual event. Members of performance cultures, however, rarely separate the experience of seeing sculptures and carvings from touching them and/or singing about them. When the medieval supplicant saw the religious image and felt it, it became a visual-tactile presence. When the Australian aborigine sees the *churinga* and sings, it is a visual-aural presence.[287] Even the narrowly visual experience of sculpture in performance cultures tends to be much more complex than it is in our own. Frequently, performative sculptures are exhibited in the midst of dances or processions, making them part of a broader kinetic display. The image is carried; the carving is worn. Analogously, members of performance cultures treat sculptures as creatures of color as well as form. In our sensorially subdivided universe, statues generally have no color except that given them by their material, such as marble white and metal gray. In many performance cultures, sculpture and painting merge with striking results. Even the Hellenic Greeks, whose sculptures we experience today as pristinely white, enthusiastically painted their works.[288]

[284] *Id.*; *see also* GIOVANNI COMOTTI, MUSIC IN GREEK AND ROMAN CULTURE 3 (Rosaria V. Munson trans., 1989); HAVELOCK, *supra* note 20, at 150-51.

[285] OKPEWHO, *supra* note 61, at 52 (quoting J.P. Clark, *The Azudu Saga*, 1 AFR. NOTES 9 (1963)); *see also* VANSINA, *supra* note 135, at 34; Daniel P. Biebuyck, *The African Heroic Epic*, *in* HEROIC EPIC AND SAGA 336 (Felix J. Oinas ed., 1978).

[286] OKPEWHO, *supra* note 61, at 59.

[287] Howes, *supra* note 44, at 63. Likewise, in Africa, "music is usually performed whenever masks are displayed." Akin Euba, *Introduction* to *Music in Africa*, *in* AFRICAN HISTORY AND CULTURE 225 (Richard Olaniyan ed., 1982); *see also* PAUL S. WINGERT, PRIMITIVE ART: ITS TRADITIONS AND STYLES 160 (1965) ("Not only the masks but many of the figures were intended to be used and/or viewed with the accompaniment of drum rhythms, vocal chants, or songs.").



The sensory interdependence of performance cultures, as evidenced by these and other communicative practices, is matched by the sensory interdependence of performative law. Just as members of performance cultures simultaneously use different media to recite poetry and exhibit sculpture, they frequently combine different channels of communication in legal expression. Law is not so much said, sung, gestured, or felt as it is holistically performed. This performance involves far more than surrounding a single legally efficacious medium (such as speech) with spectacular sensory supports. On the contrary, performative legality tends to reside in the unity of sensory expression to the point where a fault of words or acts may be equally fatal to the legality of a transaction.[289]

Of course, just as contemporary Anglo-American law retains certain aural, gestural, and tactile features, it is not altogether unfamiliar with the orchestration of several sensory elements in performance. For instance, it has been suggested that "performance" properly describes a modern trial, considered as a work of legal theater simultaneously implicating and relying on both verbal and nonverbal forms of expression.[290] Such legal ceremonies as the signing and witnessing of wills are perhaps performances of a less ambitious sort. In our own writing culture, these multisensory legal routines are nonetheless the exception rather than the rule. Moreover, they either depend for their validity on strict adherence to written directions (will execution), or they are subject to written control and correction on the basis of their written records (trials). Performance may therefore not have disappeared from our legal universe, but it has certainly been marginalized. Our law is considered to reside primarily in documents, not doings.

The same cannot be said of law in performance cultures. In societies with little or no access to writing, law that cannot be inscribed is con-

[288] GISELA M. RICHTER, A HANDBOOK OF GREEK ART 46 (1959). The paint has worn off over the years.

[289] The formalism of performative law has been exaggerated in most of the literature, but the point that significant errors of either saying or doing can vitiate a proceeding is probably correct. *See, e.g.*, ROBERT W. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE 14 (1952) (speaking of Anglo-Saxon law: "Any stumbling or stammering, any variation from what has been ordained as to gesture or bodily position, is fatal.").

[290] Milner S. Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81 (1975).

stantly being performed. Many of the specific aural, visual, tactile, and savory legal acts highlighted so far are ultimately parts of larger performative wholes. However useful and even analytically necessary it has been to isolate them according to sensory category (in order to demonstrate the range of media put to legal purposes in performance cultures), at least some must be put back in context if the reader is to understand how most performative legal transactions are actually executed and experienced.

Consider, for instance, the biblical transfer of a sandal (denoting the transfer of land) that we incidentally encountered in "The Sight of Law."[291] In practice, this was only one component of a conveyancing procedure that depended on a subtle interweaving of aural, visual and tactile elements. The *Book of Ruth* gives us a good sense of what usually occurred. According to Scripture, Naomi wished to sell land acquired from her deceased husband Elimelech. The sale took place at the town gate, with Naomi's relative Boaz acting as her agent. Boaz explained before "ten men of the elders of the city"[292] that if an unnamed man who was the closest blood relative of Naomi's husband wished to buy the land, he had to do so then, or otherwise the right of purchase would fall to Boaz himself in his own capacity as a relative. The man initially agreed to buy the land, but then he reconsidered, saying to Boaz, "Buy it for yourself."[293] At the same time, the man took off his sandal and gave it to Boaz, for "it used to be the custom in Israel that, to make binding a contract of redemption or exchange, one party would take off his sandal and give it to the other."[294] After receiving the sandal, Boaz turned to the witnesses and declared,

> You are witnesses this day that I have bought from the hand of Naomi [albeit through the unnamed man] all that belonged to Elimelech. . . . Also Ruth the Moabitess, the widow of Mahlon, I have bought to be my wife, to perpetuate the name of the dead in his inheritance. . . . [Y]ou are witnesses this day.[295]

[291] *See supra* note 175 and accompanying text.

[292] *Ruth* 4:2. (Revised Standard Version).

[293] *Ruth* 4:6.

[294] *Ruth* 4:7 (New American Bible). The Revised Standard translation of this verse inaccurately refers to the transfer as merely "confirming" a transaction.

[295] *Ruth* 4:9-10 (Revised Standard Version).



The witnesses then acknowledged their role by replying, "We are witnesses."[296] The formal conveyance had been aurally explained and acknowledged. It had been visually manifested in the passing of the sandal. It had even been felt by the parties who gave away the sandal and acquired it. This was more than merely law for the ears, the eyes, or even the hands. This was law for the whole body.

The ancient Roman transaction of transfer called *mancipatio* (parts of which we have already encountered piecemeal) was also a performance. The transaction required the presence of the immediate parties, at least five Roman citizens of legal age, a bronze ingot, a set of scales, and a person (*librapens*) to carry the objects. *Mancipatio* officially began when the transferee grasped the object of transfer and said (in the case of a slave), "I declare that this slave is mine according to Quiritary right, and be he purchased to me with this bronze ingot and bronze scale."[297] At this point, the transferee struck the scales with the bronze, and then passed the bronze to the transferor.[298] Again, the event was multisensory: a synthesis of aural communication (the words and the sound of the bronze striking the scale), visual communication (the grasping of the claimed object in the view of the parties and of witnesses), and tactile communication (the grasping of the claimed object by the transferee). A person who either could not hear, see, or feel did not get the full sensory benefit of the transaction.

Finally for present purposes, consider the performative dimensions of the homage and investiture ceremony of the early Middle Ages. The procedure's gestural and tactile aspects appear nicely integrated with aural elements in this unusually-complete description from 1127:

> [The vassal] did homage in this way. The count asked [the vassal] if he wished to become his man without reserve, and the latter answered: "I do." Then joining his hands together, he placed them in the hands of the count, and they bound themselves together by a kiss. In the second place, the man who had just done homage pledged fidelity . . . to the count in these words: "I promise on my faith to be faithful from now on to count William and to observe [the obligations of] my homage completely, in good faith, and with-

[296] *Ruth* 4:11.

[297] INSTITUTES, *supra* note 176, at 1.119.

[298] *Id.*

> out deceit, against all men," and this he swore on the relics of the saints. . . . Finally, with a little stick which he held in his hand, the count gave investiture [of fiefs] to all who had . . . promised security, done homage, and taken the oath.[299]

A busier scene would be hard to imagine. The vassal spoke and heard the words of his lord. He performed and saw various gestures. He was directly touched by his lord in the handclasp and in the kiss of homage, and he felt the stick transferred to him upon investiture. A variety of senses simultaneously informed him that he had acquired rights and obligations. Neither he nor his witnesses could deny their combined evidence.

### *B. Foundations of Performance*

Why do members of performance cultures perform? Why do they insist on communicating significant cultural and legal meanings through several media to several senses simultaneously? Prosaic as it sounds, one reason is surely sheer convenience. Most of the media used in performance cultures rely on immediate, face-to-face contact between individuals. Effective speech requires a speaker and a present listener; meaningful gesture needs a gesturer and a present observer; touch needs a toucher and a person present to be touched. Once any one medium forces a communicator into face-to-face contact, other media immediately become accessible and useable to supplement or reinforce the communicator's message. It is therefore convenient for a speaker to make a gesture or to extend a touch. The performative individual who announces a legal accusation or makes a legal contract may additionally strike the defendant or shake the other party's hand, if for no other reason than because they are there.

Contrast this with the situation of a writer in a writing culture. One of the greatest strengths of writing as a medium is its technological capacity physically to separate the sender of a message from its recipient. Unlike speech, gesture, and so forth, writing can function totally apart from the immediate presence of another person; the writer and the reader need never meet. In order to take advantage of this feature, however, a writer must put everything down on paper. What is not actually written (or,

[299] JOSEPH R. STRAYER, FEUDALISM 122 (Louis L. Snyder ed., 1965) (alteration in original) (quoting GALBERT OF BRUGES, DE MULTRO . . . KAROLI COMITIS FLANDIARUM 89 (Henri Pirenne ed., 1891)).



sometimes, what is expressed by other means) will not be communicated. Writing thus discourages simultaneous reliance on speech, gesture, touch, and savor. Even when members of writing cultures engage in other forms of communication (aural, visual, or face-to-face), many frequently act as writing has socialized them to act, that is to say, they draw minimal support from other media, no matter how physically convenient those media may be.[300] In the legal communities of some writing cultures, this behavior is a point of professional pride. The quintessential English barrister never moves and rarely gestures in oral argument.

The convenience and popularity of performance in performance cultures is both reflected and reinforced by a belief that all forms of expression and sensory experience are somehow united. This belief is frequently manifested in a tendency to describe—and even to react to—one medium in terms of another, a phenomenon known as synesthesia.[301] In the midst of a writing culture that insists on separating and classifying media and sensory experience, modern American English preserves a limited number of synesthetic expressions. Some colors are "loud" (sight described in terms of sound); some smells are "sweet" (smell described in terms of taste); some notes are "sour" (sound described in terms of taste).[302] In early Greek culture, these constructions occured so often that they exceeded the boundaries of simple poetic license or artistic metaphor. Rather, they reflected a fundamental habit of thought. Homer frequently used visual imagery to describe aural communication. In the great Greek epics, the voice of goddesses is "lily-like" and hymns "blaze-up" to heaven. The Greek tragedian Aeschylus likewise reported that "the trumpet set the shores ablaze." Other Greek writers assimilated touch and sight, describing "smoothness" and "whiteness" interchangeably.[303] The lyric poet Simonides is said to have declared, in a famous synesthetic turn of phrase, that "[p]ainting is silent poetry, poetry is painting that speaks."[304] The language of the Old Testament reflects the power of syn-

[300] *See* TYLOR, *supra* note 132.

[301] On synesthesia generally, see LAWRENCE E. MARKS, THE UNITY OF THE SENSES: INTERRELATIONS AMONG THE MODALITIES (1978). On the comparative prominence of synesthesia among "primitive and archaic" peoples, see HEINZ WERNER, COMPARATIVE PSYCHOLOGY OF MENTAL DEVELOPMENT 86-88 (1948).

[302] CHIDESTER, *supra* note 198, at 15-16.

[303] IRWIN, *supra* note 129, at 19-21, 209-13 *passim*.

[304] CECIL M. BOWRA, THE GREEK EXPERIENCE 155 (1985) (citing PLUTARCH, DE GLORIA ATHENIENSIUM).

esthesia in Hebrew tradition. One striking passage from the *Book of Exodus*, correctly translated, reads: "And all the people saw the thunderings, and the lightning, and the voice of the shofar, and the mountain smoking."[305] "Seeing" here has a distinctly aural as well as visual dimension. Today, members of South American Andean cultures share a similar perspective on sense-expression and experience. One language group uses a single word to describe pleasant speech (sound), the sweetness of dried fruit (taste), and a soft tactile sensation (touch).[306] From such easy associations it is but a very short step to the conclusion that all media are naturally associated. There is, in other words, no bright-line distinction between the so-called "different" media or senses, and any conscious preference for communicating through a single sense, as opposed to a combination of senses simultaneously, has no basis.

If we adopt this perspective on performance, we need to reinterpret some of the legal transactions we have encountered. In synesthetic performance cultures, a legal act we would associate with one sense may be understood to also exist in another sensory dimension. For instance, a tactile transfer within a performance may be understood as having an aural aspect. Passing an object to another person may be literally understood as giving that person not just the property or a symbol of it, but one's word (in practice, the words of conveyance or pledge spoken on transfer of the object; the modern expression "to give one's word" may preserve this synesthetic conception). Some scholars have suggested that the Mesopotamian practice of striking someone on the forehead to make an accusation against him was considered not just a forceful way of making a legal claim, but a literal placing of the spoken charges upon the accused's head.[307] Here the spoken word was presumed to have a tactile side. Taking an oath by taking a drink (or eating food) might similarly be seen as "swallowing" the vow, causing it to become literally a part of the oath-taker and thus a physical danger to him should it ever be dishonored.[308] This synesthetic

[305] Lawrence E. Marks et al., *Perceiving Similarity and Comprehending Metaphor*, 52 MONOGRAPHS OF THE SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 2 (1987) (quoting *Exodus* 20:18).

[306] Constance Classen, *Sweet Color, Fragrant Songs: Sensory Models of the Andes and the Amazon*, 17 AM. ETHNOLOGIST 722, 727 (1990).

[307] Malul, *supra* note 155, at 581-82.

[308] ROBERT R. MARETT, SACRAMENTS OF SIMPLE FOLK 172 (1933); *see also* THUNDYIL, *supra* note 259, at 12 & nn.45, 48.



belief was made explicit in early Hebrew culture, which had to accommodate it to the circumstances of a marginally literate society. The *Book of Numbers* declared that if a woman were accused of adultery, she would have to swear an oath that was structured to bring curses down on her if she falsely claimed she was innocent. The officiating priest was required to "write these curses in a book, and wash them off in to the water of bitterness; and he shall make the woman drink the water of bitterness."[309] It has recently been suggested that the South American Incas understood their oath-taking ceremonies in very much the same way.[310]

A third reason for the popularity of performance in cultures with little or no experience with writing has to do with the ephemerality of most nonwritten media. The spoken word is fleeting, as is the gesture, the touch, the smell, and the taste. In one instant, they can be heard, seen, felt, and so on, and in the next instant they vanish. Even the material props of performance—objects such as sculptures, carvings, or paintings—may be relatively rare and are frequently perishable.[311] This creates a fundamental problem for a preliterate or marginally literate society. How can it preserve its core cultural and legal information over time? It must preserve this information in order to survive and grow; if it fails it will forever be reinventing its own traditions, potentially at great social cost.

In this context, the secret of social survival is memory. Information must be remembered by the individuals who hear, see, feel, or savor it, so that they can retell it or recreate it later, and thereby pass it on to others and to the next generation. This overwhelming need to remember makes performance highly attractive as a strategy of communication. When information is performed, it is spread across the sensory spectrum. In part it may be heard, in another part seen, in yet another part felt, and so on. This has two consequences. First, every medium implicated becomes a hook from which the thread of memory can hang. Someone might not immediately remember hearing something, but they might remember seeing it or feeling it. Second, if several different media are used to transmit exactly the same message, the power of that message as a whole is rein-

[309] *Numbers* 5:23-24 (Revised Standard Version).

[310] Classen, *supra* note 306, at 727.

[311] In some performance cultures, these objects may even be intentionally discarded after use. *See* Suzanne Küchler, *Malangan: Art and Memory in a Melanesian Society*, 22 MAN 238 (1987).

forced to the point where the audience may be overwhelmed with sensory input (making distraction or passivity, and hence forgetting, impossible).[312] In both cases, each additional medium employed in the transmission of important cultural or legal information serves as additional insurance that the information will survive.[313]

This observation may go far to explain why primary cultural and legal transactions in performance cultures involve so many senses. It may explain, for instance, why the medieval Mass (much of which endures in modern Catholic practice) summoned every sense to the knowledge and love of God,[314] and why the homage ceremony that established the central legal relationships of feudalism transcended simple speech to embrace visual and tactile communication.[315] The inherent memorability of performance also helps to explain why performance becomes less popular in writing cultures. Given the possibility of recording information physically in such societies, remembering is less important, and performance is less necessary.[316] Indeed, because of the time and energy performance requires and the opportunity cost it represents in information not inscribed, it may become culturally and legally inefficient.

[312] See for instance the discussion of "flow" elaborated in VICTOR TURNER, FROM RITUAL TO THEATRE: THE HUMAN SERIOUSNESS OF PLAY 55-59 (1982).

[313] On the mnemonic superiority of multi-sensory over single-sense communication, see the numerous scientific studies cited and discussed in Khosrow Jahandarie, The Modality Effect 323, 380 (1987) (unpublished Ph.D. dissertation, Stanford University). The greater mnemonic value of multisensory communication may indirectly help to explain the popularity of synesthesia in performance cultures. *See supra* notes 301-10 and accompanying text. Meaning that is mentally understood and experienced (if not always physically deployed) in what we would regard as several sensory channels may be more accessible to the memory than meaning experienced as "just sound" or "just touch," etc. On the general association between synesthesia and memory, see A.R. LURIA, THE MIND OF A MNEMONIST 21-29 (Lynn Solotaroff trans., 1968).

[314] CHIDESTER, *supra* note 198, at 92.

[315] In the words of one medieval scholar, "Word and gesture complemented each other; and, when combined, they impressed themselves even more forcefully on the participants than either would have done alone." von Rautenfeld, *supra* note 237, at 86.

[316] It is particularly interesting that in the transition from performance to writing culture, the more mnemonically effective media are the first to fall from social favor. For instance, active gesture is eclipsed in culture and law before static pictures. Pictures, in turn, are culturally eclipsed before texts. It is as if these various media go into decline as soon as the availability, popularity, and permanence of written forms (script, and later print) makes them mnemonically redundant. On the mnemonic superiority of action over stasis and pictures over text, see the numerous studies cited in Jahandarie, *supra* note 313, at 362-64, 379.



### C. *Performance and the Sensory Distribution of Meaning*

The phenomenon of performance, whether explained on grounds of convenience, psychology, or mnemonics, has important implications for our understanding of performative cultural and legal meanings. In our own writing culture, we expect each individual medium to be definitive. A writing, painting, or sculpture should be self-contained and self-explanatory. If a work is not self-contained and self-explanatory, its meaning is jeopardized as soon as it stands alone. In a performance culture, however, a single medium never has to bear the entire communicative burden of a message. Speech, for instance, need not be definitive where performers can gesture. Showing can supplement telling. The sociologist Basil Bernstein has in fact argued that, because of this constant interaction between media, societies or subcultures with less experience in writing need only employ a "restricted," as opposed to an "elaborated," code of verbal communication.[317]

Failing to recognize that particular performative media appear in the context of other media may be both unfortunate and misleading. Anthropologist Sam Gill has suggested that trying to understand a performance by means of, say, spoken language alone

> is something akin to trying to appreciate a ballet by reading the musical score of the violin in the orchestra. If we know the ballet, we might well see that the violin carries one of the major themes, but what an enormous loss to our eyes, ears and hearts if this is all we are ever permitted to see.[318]

Another anthropologist, Ruth Finnegan, has taken "oralists" such as Walter Ong to task for concluding from the written record of performative speech that the heroes of most performative epics are type-characters with little individual personality:[319] "Characterization . . . need not be expressed directly in words when it can be as clearly and as subtlely portrayed through the performer's face and gestures . . . ."[320]

[317] Basil Bernstein, *Elaborated and Restricted Codes: Their Social Origins and Some Consequences*, *in* THE ETHNOGRAPHY OF COMMUNICATION (John J. Gumperz & Dell Hymes eds., 1964).

[318] SAM GILL, BEYOND "THE PRIMITIVE": THE RELIGIONS OF NONLITERATE PEOPLES 57 (1982); *see also* FINE, *supra* note 31, at 133.

[319] ONG, *supra* note 12, at 70.

[320] Ruth Finnegan, *Literacy Versus Non-Literacy: The Great Divide*, *in* MODES OF THOUGHT: ESSAYS ON THINKING IN WESTERN AND NON-WESTERN SOCIETIES 112, 137-38 (Robin Horton &

Studying any medium of performative law (especially language, as actually spoken or as occasionally recorded in writing) only in isolation is clearly unwise. Doing so may encourage the incorrect belief that performative law is either limited or operates haphazardly. To take a simple example, a performative contract may not verbally identify its object. In the Roman *mancipatio*, the parties referred to the slave in question only as "this man," a generality that would be anathema in any modern contract. The visual and tactile acts of touching or grasping settled the slave's identity. Someone who merely heard the words of conveyance would be ignorant of its substance, but someone who heard and saw would understand. Likewise, a valid performative conveyance may not define the bounds of a conveyed property, or it may define them in the loosest of terms. An English charter from around 1209 thus recorded the grant of half an acre in Dunfurlong without recording anything more.[321] Another English charter from about the same period described a grant of land as extending "in length from a certain oak towards Hedislethe, which has been uprooted there."[322] Here the writing may not have fully captured what was said, but even the absence of further speech would not necessarily have meant that bounds were left uncommunicated and unknown. Verbal vagueness may have been mitigated by a conveyancing procedure that gave witnesses the opportunity of perambulating or viewing the boundaries or which presumed a preexisting visual familiarity with territory. There was, therefore, little need to include lengthy and difficult boundary descriptions, either in an oral conveyancing formula or in any document recording the conveyance. Transactions such as these remind us that because members of performance cultures perform their legal meanings, they deploy legal information in different patterns and sensory ratios than we do. Failing to recognize this would reveal an intellectual weakness that is less theirs than ours.

## IV. Conclusion

In the body of this Article I have made two fundamental points. First, I have argued that just as members of societies having little or no experience with writing ("performance cultures") communicate significant information through media embracing the entire sensory spectrum, they express their legal meanings in myriad permutations of sound, gesture, touch, and savor. Resisting the temptations of "graphocentrism" on the one hand and the siren song of orality on the other, we need to reorient our study of preliterate and marginally literate legal expression to take all these forms of communication into account. Second, I have suggested that just as considerations of convenience, psychology, and memory encourage members of these cultures to transmit significant information by several media simultaneously, the law of such societies is not so much proclaimed, gestured, or otherwise manifested in a single medium as it is holistically performed. Because this practice enables legal meaning to be distributed among different media instead of being concentrated in a single channel, we must take care to consider the totality of verbal and nonverbal information in any given performative legal transaction.

To have considered the media and modes of communication and legal expression favored in performance cultures is to have confronted a world that is both strange and vaguely familiar. That world is strange because members of performance cultures routinely employ and indeed prefer media and combinations of media that we have largely rejected—in some instances, even ridiculed or forgotten—as carriers of important cultural and legal information. It is nonetheless vaguely familiar because, even in the face of our own rejection of nonwritten (and largely nonverbal) channels for formal intellectual communication, we still use them and indeed depend on them in our daily, ordinary intercourse with one another. At least to this extent, we are all performers of a sort.

Our limited familiarity with performative media and even performance itself indicates that we can be open to performative meanings if we choose. Although our own culture has trained us not to expect important messages—in particular, legal messages—to be transmitted in certain ways, we can still receive them by making a special effort to actually or figuratively listen, look, feel, and so on. In a manner of speaking, this Article has been an appeal for us to do just that—to "come to our senses" long enough to transcend our writing-induced prejudices and experience general and legal meaning on another culture's terms. Achieving these goals may become easier as our own culture begins to change and new audio and video technologies reacclimate us to nonwritten ways of knowing and telling.

Ruth Finnegan eds., 1973).

[321] Memory, *supra* note 2, at 64-65.

[322] *Id.* at 64.

Adjusting our agenda of communicative relevance is nonetheless only a first—albeit necessary—step towards understanding life and law in performance-based societies. As the reader may recall from the introduction, a variety of media theorists have argued that because communication is essential to the survival of any community, societies tend to favor behavior and beliefs compatible with the characteristics of the media they depend upon. If these theorists are right, then the societies and, by implication, the legal systems I have described as relying on performance should reflect the substantive characteristics of performance.

Identifying the characteristics of performance and exploring their possible manifestations in culture and law are obviously major undertakings that require consideration in a separate paper. In order to whet the reader's appetite, however, and in order to show just where the present work has led us, let me briefly outline what I believe some of these characteristics and their manifestations to be.

First of all, performance is personal. Unlike writing, which can exist apart from the writer, performance that depends on the use and synthesis of such media as speech, gesture, and touch requires the ongoing, live participation of a human actor. In a culture where little if anything can be looked up in written words, no significant knowledge passes without personal action. Without the performer, there is no performance. In this environment, individuals quickly come to associate what is performed with who is performing. Information cannot exist independent of the status or reputation of the human individual presenting it. The objective appreciation of a message is inevitably entangled with a subjective appreciation of its messenger.

As a result, the performative understanding of law differs profoundly from our own. In a writing culture that can physically separate contracts, judgments, and statutes from their proponents, we consider law to exist apart from, and indeed above, human individuals. This attitude is perhaps best captured in the aspirational phrase "a government of laws and not of men."[323] In performance cultures, however, laws and men are virtually

[323] This quote is commonly attributed to John Adams, first from his Novanglus Letters of 1775, JOHN ADAMS, 2 PAPERS OF JOHN ADAMS 314 (Robert J. Taylor ed., 1977) (Novanglus Letter No. VII), and repeated in the Massachusetts Constitution, MASS. CONST. of 1780, Declaration of Rights, art. XXX. It is probably no coincidence that this concept was articulated at the same time that increased use and acceptance of print technology secured the written word's cultural ascendancy in America.



coincident.[324] Finding the law generally means finding someone who can perform or remember it. Disputes are resolved not by appealing to texts, but rather by questioning live witnesses and invoking personal authorities. In the absence of dispositive evidence, legal rights may depend not on argument, but on comparative calculations of personal honor and status. The oath of a nobleman may trump the oath of a slave.

Besides being personal, performance is also social. Communicative success depends on the live performer actually appearing before a live audience. This continually forces would-be tellers and knowers into social situations. What a contrast with the proverbial image of a writer scribbling alone in a garret, or a reader poring over a book in the solitude of a carrel! In the short term, the social aspect of performance encourages members of performance cultures to be responsive to the needs and desires of their present interlocutors, and equally encourages those interlocutors to make their preferences known to physically accesible performers. Performances, unlike writings, are thus products of spontaneous action and reaction. Ultimately, performances unburdened by permanent physical form may be modified to suit different audiences on different occasions. In performance cultures, there is therefore no standard performance—no perfect, original epic poem for example—only variations on a theme.

In the long term, the social aspect of performance creates a cultural atmosphere in which sociable behavior is greatly prized. The more sociable people are, the more likely they are to communicate, and the more likely it is their cultural corpus will be preserved. Individuals in performance-based societies become so accustomed to and dependent upon contact with one another that they tend to conceive of the very idea of "self" in social terms, identifying themselves primarily by their social relationships and the opinion that others have of them. This encourages the development of outwardly oriented "shame cultures" as opposed to inwardly oriented "guilt cultures."[325]

The social nature of performance means that performative law must be

[324] As one scholar has written of the ancient Greeks, "the laws for them are not cold principles once [and] for all embodied in the statute-book. They come forward as living and speaking personalities—questioning, reasoning, appealing, exhorting." BUTCHER, *supra* note 108, at 173.

[325] On the provenance and history of these anthropological concepts, see Millie R. Creighton, *Revisiting Shame and Guilt Cultures: A Forty-Year Pilgrimage,* 18 ETHOS 279 (1990).

presented in front of others. The identities or predilections of those others may affect the content of the law performed, even as it is being performed. Lacking the writer's luxury of formulating decisions in private, performative judges making public pronouncements must be both socially sensitive and socially persuasive. Furthermore, what is presented as law on one occasion before one group may not correspond exactly to what is presented as law on another occasion before another group. Performative law thus tends to be open-textured.

The general importance of social contact in performance cultures encourages performative "lawmakers" to make special efforts to preserve the human relationships that make socialization (and thus communication) possible and pleasurable. In the event of a conflict between individuals, performative authorities tend to prefer arbitration and compromise to adjudication because the former techniques bring parties together and help sustain relationships and dialogue while the latter process creates competition and conflict that inhibits dialogue, strains relationships, and may ultimately endanger the cultural corpus. Performative law even defines many wrongs in relational rather than in purely physical or economic terms. Disloyal acts, or acts that socially separate an individual from the communication or company of others by shaming him, are particularly odious.

Additionally, performance is dynamic. Unlike writing, it expresses meaning by action, not stasis. It lives in energetic and frequently mobile combinations of sensory media and not in physically fixed words. By virtue of being dynamic, performance is most effective at communicating meanings that are themselves dynamic. In other words, because it is action, it is better at describing and depicting action than it is at describing and depicting inaction. In this sense performance has much in common with television, a modern dynamic medium. Just as thought, as a static abstraction, makes bad television, it makes bad performance. A story, on the other hand, makes good television and good performance. Because of this, actions quickly become the primary type—even the measure—of performative reality, to the extent that concepts and situations that we would consider inherently inactive (such as contemplation) are in performance often translated into action (such as a conversation between a hero and his spirit).[326] Intellectually, performance cultures revolve around

[326] On this remarkable phenomenon in early Greek culture, see R.W. Sharples, *But Why Has My Spirit Spoken With Me Thus?: Homeric Decision-Making*, 30 GREECE & ROME 1 (1983).



"becomings" rather than "beings,"[327] what happens as opposed to what is.

The dynamism of performance is arguably reflected in the performative inclination to think of law not as things but as acts, not as rules or agreements, but as processes constituting rule or agreement. A performative contract, for instance, is not an object, but a routine of words and gestures. A witness to a contract testifies not to the identity or correctness of a piece of paper, but to phenomena seen and heard. Likewise, members of performance cultures tend to think of justice not as something that simply is, but rather as something that is done. This may help to explain why the legal systems of performance cultures seem more concerned with matters of procedure than matters of substance, to the point where "substantive law has at first the look of being . . . secreted in the interstices of procedure."[328]

Finally, lacking any permanent record, performance is ephemeral. Because it exists in time, it is constantly coming into and going out of existence. This is somewhat ironic, given that performance itself is—at least in part—calculated to mitigate the inherent ephemerality of its sensory components. Obviously, mitigating the problem does not eliminate it. The ephemerality of performance makes the cultural corpus of performance-based societies exceedingly vulnerable both to intentional and unintentional change. Such changes cannot readily be detected where no fixed physical records of lore and learning exist. At the same time, the ephemerality of performance encourages members of performance cultures to organize and orchestrate performance to maximize memorability and minimize the likelihood of change. In many performance cultures, these goals are accomplished by a combination of publicization, concretization, and stylization. Performance is publicized by being presented in front of many people rather than in front of few, the theory being that in such a setting more people are likely to remember it. Performance is concretized not only by having a physical reality, but by evoking ideas and experiences which themselves can be imagined as having physical reality, and are

[327] This terminology, drawn from Greek philosophy, is elaborated in HAVELOCK, *supra* note 20, at 182.

[328] SIR HENRY S. MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (New York, Henry Holt and Company 1883).

therefore more amenable to memory. Performance is stylized by being cast in formats that are easily recalled by reference to a recurrent sound, pattern, or brief formula.

Each of these mnemonic strategies has a legal counterpart. In a sense, ephemerality is the greatest enemy of law in any society. The very concept of law implies the continuing existence of standards. To the extent that law mandates the application of yesterday's rule today, it requires first that yesterday's rule survive, mnemonically if not physically. Performative contracts are therefore performed in front of many witnesses rather than few; performative disputes are resolved in public rather than in private; performative legislation is announced on the village common rather than solely in the king's chamber. For the convenience of memory, performative legal rules are expressed not in the abstract, but in stories and tales that evoke the concrete images of actors doing right or wrong. Performative legal ceremonies rely heavily on memorable aural and visual patterns, on repetition, on pithy expressions and compact, sometimes exaggerated actions. To the extent that these techniques are successful, performative law can legitimately claim to be custom, understood as "what was done and always has been done." Without generally accessible written records safe from memory's failings, the meanings and messages of performative law are nonetheless condemned to change gradually over time.[329]

For the moment, of course, all these observations and contentions—even when cast in their strongest, most provocative forms—are but hypotheses that must eventually be tested according to anthropological and historical evidence. Unfortunately, such testing is outside the scope of this Article. If, however, the reader now has a better understanding of (and feeling for) communication and legal expression in performance cultures, and in particular has a sense of how vitally important the phenomenon of performance is to cultural and legal life in these societies, then the Article will have accomplished its limited purposes. The rest can be left for another day.

[329] This change may be so slow and so antithetical to the overriding cultural goal of remembering that individuals within a performative legal system may be altogether unaware of it.

# THE CONCEPT OF INDEPENDENCE IN PUBLIC LAW

*Brian C. Murchison**

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